S. HRG. 103–80

PROHIBITING DISCRIMINATION AGAINST ECONOMIC STRIKERS

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON

LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 55

TO AMEND THE NATIONAL LABOR RELATIONS ACT AND THE RAILWAY LABOR ACT TO PREVENT DISCRIMINATION BASED ON PARTICIPATION IN LABOR DISPUTES

MARCH 30, 1993

Printed for the use of the Committee on Labor and Human Resources

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MARCH 30, 1993

ADDITIONAL MATERIAL

PROHIBITING DISCRIMINATION AGAINST ECONOMIC STRIKERS

TUESDAY, MARCH 30, 1993

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room SD–430, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Kennedy, Metzenbaum, Harkin, Wellstone, Kassebaum, Jeffords, Thurmond, and Hatch.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The subcommittee will come to order.

This morning is a very unusual morning in that both the House and the Senate will be considering the striker replacement bill, and the Secretary of Labor has been very cooperative to be here with us this morning at 9, and he is due at a hearing on the House side at 10.

The chair has an opening statement which the chair is going to put into the record rather than read it in its entirety, and I would hope that other members of the subcommittee would accommodate the Secretary in this respect so that we might have time to not only hear his statement, but to ask him some questions as well.

So with that, I would turn to my colleague Senator Hatch and ask whether you would be willing to do the same as the chair.

[The prepared statement of Senator Metzenbaum follows:]

PREPARED STATEMENT OF SENATOR METZENBAUM

This morning the Subcommittee on Labor convenes to hear testimony on S. 55, the Workplace Fairness Act. This legislation would prohibit the hiring of permanent striker replacements.

A fundamental principle of our labor law is under siege. The right to strike, the worker's main protection in the collective bargaining arena, has been gutted, and it is time for Congress to act.

We all agree that as a nation we must do all we can to ensure U.S. competitiveness into the next century. But we cannot and will not be competitive without a healthy relationship between labor and management, built on trust. Today, the fabric of our industrial relations is being ripped apart by distrust and divisiveness. To change this situation, we must first eliminate the destructive practice of hiring permanent replacements.

Our Federal labor law is premised on collective bargaining as the preferred means of resolving labor disputes. For workers, the right to strike is essential because it provides economic leverage. Although workers seldom strike, their right to do so is critical to bringing the employer to the table.

Nevertheless, our labor law contains a bizarre contradiction: an employer cannot discharge or discipline employees for striking, but it can "permanently replace" them. While employers seldom exercised this right in the past, today they hire or threaten to hire permanent replacements in one out of every three strikes. That has a substantial chilling effect on the right to strike: how can workers contemplate exercising it if they will lose not just pay and benefits, but their very jobs?

By its terms, the Workplace Fairness Act prohibits the hiring of permanent striker replacements. But there is much more at stake here. First, the future of the American labor movement depends on restoring the right to strike as an effective economic weapon. In turn, a healthy labor movement will restore balance to labor-management relations, facilitate greater labor peace, and contribute much toward ensuring U.S. competitiveness in world markets.

Second, for America's hardworking men and women, whose hours are growing longer and whose paycheck is growing smaller, this is an issue of basic fairness. Simply put, American workers should not have to choose between their jobs and their right to take collective action.

In short, America badly needs this bill. But don't take my word for it. Last April, President Clinton told striking Caterpillar workers that the use of permanent replacements would have "a devastating effect, not only on the employees and their families, but on the whole fabric of worker-management relations all over this country." The need to prohibit this hiring of permanent replacements has similarly been recognized by State governments, civil rights groups, labor law scholars, newspaper editorial boards, and the religious community. And most importantly, the American public overwhelmingly supports a ban on the hiring of permanent replacements, by a margin of three to one. I look forward to hearing the testimony of the witnesses who have joined us this morning, and to moving swiftly to enact the Workplace Fairness Act.

Opening Statement of Senator Hatch

Senator Hatch. I will be extremely brief.

I am happy to welcome you here, Mr. Secretary, and the other witnesses as well. We have a number of very important witnesses.

In the 102d Congress, we all looked at this issue, and we all, I think, know quite a bit about it. But I think it is important to revisit it here today, especially since President Clinton said that he would sign this bill into law if it passes both Houses of Congress.

So the witnesses this morning are very important. This is a very important session of Congress. The impact of S. 55 on collective bargaining, in my opinion, would be disastrous, but we'll look at that through the questioning system.

I thank you, Mr. Chairman.

Senator Metzenbaum. Thank you.

Senator Kennedy.

Opening Statement of Senator Kennedy

Senator KENNEDY. Mr. Chairman, I'll ask to put my full statement in the record. I want to express all of our appreciation to you for chairing this hearing and for the leadership you have provided on an issue of basic fairness and decency in the workplace.

I welcome the fact that we have a Secretary here who is urging fairness to working men and women in this country and that we have a President of the United States who will support this legislation.

I do not think it is inconsequential that over the period of recent years, there has been a significant decline in the wages of working men and women, a decline in terms of coverage on pensions and health care and a decline in a whole range of issues involving employee benefits.

I have had the opportunity to read the Secretary's statement. It is completely consistent with what this President is attempting to do, which is to put people first. And I hope that all of the members will read the testimony carefully and closely.

As chairman of the full committee, I want to give the assurance to the Secretary and to the chair that we will act as expeditiously as we possibly can and work with the administration so we'll have an opportunity of getting this legislation into law.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Kennedy.

[The prepared statement of Senator Kennedy follows:]

Prepared Statement of Senator Kennedy

I commend the subcommittee for this hearing on legislation to prevent discrimination against workers engaged in labor disputes. I particularly commend Senator Metzenbaum for his leadership on this issue in recent years, and I look forward to working closely with him in the current Congress.

I also welcome our witnesses. It is a privilege after so many years, to have a Secretary of Labor with us who recognizes the need for this legislation and who supports its enactment.

The pending Striker Replacement bill restores the original promise of the National Labor Relations Act one half a century ago that workers will have the right to join unions, bargain collectively, and participate in peaceful activity, including strikes, without fear of losing their jobs.

Especially in recent years, these words of the act have become an empty promise. The loophole created by the court in the *Mackay* case in 1938 has been dusted off by more and more employers during the Reagan and Bush administrations as an unfair strike-breaking weapon.

In the past 12 years, as a practical matter, tens of thousands of workers have lost their right to strike because of threats by their employers that they will be "permanently replaced".

The repeated and unfair resort to this tactic by employers has drastically disturbed the balance of the National Labor Relations Act, in a way that was never intended, and that has damaged the livelihood and often destroyed the lifetime savings of thousands of workers.

As we all know, the invariably widespread use of this tactic in recent years, was backed up by the threat of a Presidential veto if Congress attempted to close the striker replacement loophole and bring the Labor Relations Act back into accord with its fair intent.

That veto is no longer available. We may still have to overcome an anti-worker filibuster by those who defend the loophole. But at last we are making progress, and I look forward to this hearing and to early action on this legislation.

Senator METZENBAUM. Mr. Secretary, it is a great compliment to you that today three Senators have sat here and waived their opportunity to give opening statements. I think it is an indication of the respect we have for you, and also it speaks loudly and clearly about the degree of cooperation that exists between the Department of Labor at the present time and the Members of Congress. We all look forward to working with you. Some of us may disagree at times, but be that as it may, I think it is certainly a good indication that we want to work together.

Thank you very much for being here. Please proceed.

STATEMENT OF THE HONORABLE ROBERT B. REICH, SECRETARY, U.S. DEPARTMENT OF LABOR

Secretary REICH. Mr. Chairman, members of the committee, Senators, thank you.

In the interest of time, I am also going to submit my formal remarks and summarize them for the record. As Senator Hatch as alluded to, the 102nd Congress did deal with this issue. You know many of the facts, many of the underlying issues, and you have debated this before. The President of the United States, President Clinton, is committed to this bill and to supporting it, and I want to State this very clearly. He supports legislation that would ban the permanent replacement of striking workers.

Let me talk about why. Senator Kennedy, you spoke a moment ago about fairness and decency. That obviously is a big part of it, fairness and decency. The records of the debates last year, the records of the debates that I have read and the testimony that I have read, are very clear on that particular point.

But I want to go beyond issues of fairness and decency for a moment and talk about the economy we are entering. It is an economy in which workers and managers have got to become partners, an economy in which the workplace is changing very, very dramatically in terms of what that partnership actually means. It is time to close the chapter on the period of hostility and distrust, a period in which labor felt and still feels that it cannot rely upon the good faith of many executives and many managers in this country.

It is time to close the chapter on a period marked by hostility and distrust. Many people start that period at the beginning of the 1980's. Some say it was the PATCO strike. Now, that's not a perfect parallel, of course, because that was an illegal strike. But President Reagan's decision to permanently replace those workers did, I believe, change the climate of opinion in this country.

Before the 1980's, according to many, many studies, it was exceedingly rare for management to permanently replace striking workers. After the PATCO strike, it became a more prevalent phenomenon, not only the permanent replacement of striking workers,

but also the threat to replace permanently striking workers, and that threat itself can have an enormously inhibiting effect on good labor-management relations and the collective bargaining process at its roots.

Others point not so much to the PATCO event but to an era of the 1980's when there was so much wheeling and dealing—I have called it "paper entrepreneurialism"—in which managers took a very shortsighted view of their companies. Many executives regarded their companies more as collections of assets to be maximized in the short term rather than communities of people whose talents and skills, loyalties and motivations, were to be developed over the long-term.

The permanent replacement of striking workers has left a lot of scars, a lot of distrust. Over the past couple of weeks, as Secretary of Labor, in fact, over the past 8 weeks—I can't believe it has been only 8 weeks—I have been talking to a great number of managers, CEOs, employees, both organized and nonorganized employees, and I can tell you that I am surprised and disturbed by the degree of distrust that still exists, a lot of that holdover from the 1980's, from Eastern Airlines, from Greyhound, from Pittston, from Caterpillar.

Each one of these events has an effect of poisoning the well. Employees remember, even if they are not in these firms, the threats to replace striking workers permanently. It deters employee voice. It deters the process of collective bargaining which is at the heart of any partnership.

Now, some people say you don't want to allow and legalize all of these things. You want to permit employers to permanently replace striking workers—you don't want to disallow that, rather. And the consequence of prohibiting employers from using permanent replacements would be to stimulate strikes, I think that is absolutely wrong. In fact, I think it is just the opposite, Mr. Chairman, members of this committee, Senators.

You see, employees do not want to strike. My view of the record and my view of the evidence is that employees view the strike as a last resort. A strike is evidence that everything has gone awry, that management has failed. A strike is not easy for employees. A strike is very hard on employees. It means that those employees very often are taking great sacrifices with regard to their wages, their benefits; they are taking great risks. Employees don't want to strike.

The use and utility of the strike in collective bargaining is as a last resort to ensure that there is bargaining in good faith.

What we have seen actually during the 1980's might be characterized as a bit of an irony, because a lot of the distrust and an awful lot of the labor controversy can be traced to the fact that there is right now among management a sense that they can permanently replace striking workers. In fact, you have some managers, I am told, who provoke strikes. They get into a collective bargaining situation, they make unreasonable demands, and they want a strike so that they can perhaps undermine the union and permanently replace unionized workers.

No other industrialized Nation that is engaging in rapid productivity growth—in fact, only one other industrialized Nation allows

the permanent replacement of striking workers. South Africa had allowed it, and I am told that South Africa now prohibits it. Only Great Britain allows the permanent replacement of striking workers. Japan, Germany, countries that are experiencing and have experienced structural growth—now, granted these countries right now are in recession, but over the last decade, these countries have experienced enormous growth—do not allow the permanent replacement of striking workers. At the heart of the labor-management relationship in these countries is a sense of partnership. That's what I want to stress.

In other words, there is a connection between not permitting the permanent replacement of striking workers and moving to a new era; closing the book on this old era of hostility and distrust and moving on to a new era in which we can really build a partnership between labor and management.

Let me just say finally one thing. Mathematicians often use the analogy of what they call in game theory a "zero sum game" or a "positive sum game." The difference between a zero sum game and a positive sum game is that a zero sum game, one side can win only to the extent that the other side loses.

Well, if we are going to be competitive in this country, if we are going to have high real wages for our people, workers who are unionized, workers who are nonunionized, our workplaces cannot be zero sum games in which either shareholders and managers or workers win and the other side loses. They have to be positive sum games, win-win situations, in which both sides gain.

But we can only achieve that through a real partnership. You cannot achieve a partnership when one side of that partnership feels that a gun is at their head. You cannot achieve a real partnership when one side of the partnership feels that they have no recourse. A true partnership means that people are dealing with one another respectfully and equally.

The use of permanent striker replacements, in other words, is a vestige of an era hopefully that we are moving away from. And in my view and in the view of this administration, this legislation is necessary to close the book finally on that era.

Thank you.

[The prepared statement of Mr. Reich follows:]

PREPARED STATEMENT OF ROBERT B. REICH

Chairman Metzenbaum, Senator Hatch, members of the subcommittee: I am pleased to have the opportunity to appear before you today to help close the chapter on the last 12 years and to outline a new, more productive chapter in the history of worker-management relations

The Clinton administration's plan for economic recovery and long-term growth calls for this Nation to invest in our future. And as our national economy becomes, increasingly, a global and technological economy, America's ability to be competitive will depend on how well we have invested in developing a skilled and motivated work force. To succeed in this new economy, we cannot afford to waste any of our resources, especially the resource most firmly rooted within our borders: our people, their ideas, their education and their skills.

But to compete effectively on a world-class level, we need even more than a high-skill, high-wage work force. We also need a new framework for labor relations—one that stimulates employee productivity and enables management to get the most out of its employees' skills, brainpower, and effort. Workers on the front line have unique perspectives on production and immediate access to information that smart businesses depend on for quick response and high quality. So it is not surprising that an increasing number of companies are finding that they profit when they treat

their work force not as just another cost to be cut—but as an invaluable asset to be developed.

The administration is committed to fostering practices that improve productivity. And I have seen many illustrations that both productivity and profitability increase when workers have a voice—whether through collective bargaining or other means of promoting cooperation between workers and management and fostering employee involvement and participation in workplace decision-making. We cannot afford to limit American competitiveness by any practices that inspire workers and managers to work at cross purposes. What will make us most competitive is a dedicated and innovative work force—and this requires a partnership between workers and employers, predicated on teamwork and mutual respect.

In short, good labor-management relations make good business—and a healthy economy. But in the most recent chapter of American labor history, productive relations between some companies and their unions have been thwarted by increasing distrust, hostility, and litigation. The permanent replacement of strikers exemplifies practices and attitudes that make real cooperation between labor and management impossible, by undermining the basic foundations of the collective bargaining system. As an editorial in the Journal of Commerce pointed out, labor cannot approach negotiations with trust and a sense of shared purpose when management has a gun pointed at the union's head. Management that has the option of simply eliminating the other side has little commitment to finding a mutually satisfactory resolution of differences.

The practice of permanent striker replacement became a prominent feature of American labor relations only in the last dozen years. I believe many employers were emboldened when, in 1981, 11,400 PATCO strikers were fired and permanently barred from reinstatement. Although PATCO was considered an illegal strike involving public sector employees—which differentiates it from the work stoppages addressed by this legislation—the action taken in 1981 sent a loud signal to the business community that the hiring of permanent replacement workers was an acceptable way of doing business. This, coupled with a distorted focus on short-term performance at the expense of long-term interests, began a decade characterized by a wave of labor disputes in which thousands of employees lost their jobs after they engaged in completely lawful economic strikes.

Strikes are usually an act of desperation, a last resort which employees undertake at great economic and often personal risk to themselves and their families. When workers enter negotiations, the last thing they want to do is strike. But the availability of that option is a crucial counter-weight to economic powers that business owners and managers bring to the bargaining table. This is why the right to strike is a fundamental premise of American labor law.

At its best, collective bargaining is a win-win process. But without a viable right to strike, employers have less incentive to engage in serious bargaining with their unions, to hammer out mutually satisfactory solutions. And unions see no point in trying to work cooperatively with management when there is no real avenue for dialog.

In the changed climate of labor relations, more employers have been willing to choose intimidation over serious negotiation. Some companies even advertise for permanent replacement workers before they begin negotiations—stockpiling them just like raw materials. Successful bargaining is made even less likely if the workers do take on this added risk and strike—and are permanently replaced. The rehiring of the strikers, and the fate of their replacements, add highly charged, problematic issues that replace and obscure the original dispute. A study conducted in 1989 by Professor Cynthia Gramm of the University of Alabama-Huntsville indicated that the use of permanent replacements not only complicates the dispute, but also prolongs the strike. Productivity is reduced by prolonged strikes—as well as by the permanent displacement of skilled and experienced workers.

Although permanent replacements have been used by only a minority of employers, the practice affects even those employers who would never use, or even threaten to use, this weapon. All employees receive the message that they are disposable, each time a work force is permanently replaced or threatened with permanent replacement. This undermines, throughout the economy, the trust necessary for true cooperation between workers and managers.

Enactment of the Workplace Fairness Act will enable us, finally, to close the book on this counter-productive recent chapter in American labor law. The legislation would restore balance in collective bargaining, allowing management to operate during a strike through alternate means, but not destroying fundamental union rights. The administration supports this legislation, because it would foster the equilibrium and stability in industrial relations which are critical to the health of our economy.

The sooner that we can conclude this chapter, the sooner we can turn our attention from the past and begin, together, to write the next chapter.

But we risk failing to meet the challenges that await us if—as Louis Brandeis said nearly 90 years ago—we "assume that the interests of employer and employee are necessarily hostile—that what is good for one is necessarily bad for the other. The opposite is more likely to be the case. While they have different interests, they are likely to prosper or suffer together." We need to remember that management doesn't "win" when labor "loses," just as workers don't triumph when businesses fail. Maintaining a balance of power that promotes labor-management cooperation promotes our long-term economic strength; undermining that balance puts us all at risk.

This recognition stands behind the profitability of firms that give employees a stake in the future of the business by making them real participants in decision-making. In the automobile industry, for example, the use of employee-involvement systems at Ford has dramatically improved assembly-line productivity and quality. In the steel industry, National Steel—a company that employs advanced labor-management participation—posted operating profits of $11 a ton last year, at the same time its major rivals were showing $19 a ton losses. There are numerous success stories—such as Motorola, Federal Express, Xerox—that illustrate the mutual gains to businesses, labor and the economy as a whole that accrue from mutual cooperation, responsibility and respect.

Times have changed since the thirties, when the first chapter of modern labor law was written. The traditional model of standardized mass production, based on economies of scale and the use of front-line workers as fungible components of the production process, will no longer sustain a high-wage economy. Instead, American competitiveness will be driven by a very different business model—one not so easily pigeon-holed as producing "goods," rather than providing "services." This model relies on a structure that furthers constant experimentation, development and the flexibility to respond quickly to new ideas and needs by providing incrementally better products. Because workers are integral to the central process of collective innovation, they need flexible skills and responsibilities that will enable them to contribute.

As we write the chapter of labor-management relations, characterized by mutual interest, rather than polarized distrust, we too will need to be flexible and open to new partnerships and new responsibilities. In this spirit, the Commerce and Labor Departments have joined together to facilitate these vital new relationships between workers and managers, by sponsoring the Commission on the Future of Worker-Management Relations. As Secretary of Commerce Ron Brown and I announced last week, the ten-member panel will be chaired by the distinguished professor and former Secretary of Labor John T. Dunlop, and will include former Secretaries of Labor and Commerce as well as a balanced group of experts from business, labor and academia.

The Commission is charged with examining the current State and legal framework of worker-management relations—and with recommending changes necessary to enhance workplace productivity through increased worker-management cooperation and employee participation. The passage of this legislation will enable the Commission to begin work with a clean slate. Then, with their help—and yours—we can start to concentrate on the solutions of the future, and not on the problems of the past.

Thank you. This concludes my prepared remarks. I would be pleased to answer any questions.

Senator METZENBAUM. Thank you very much, Mr. Secretary.

I just want to say as a prefatory comment that I think that you have set out a program with reference to cooperation between labor and management that in my many years, I haven't heard many in government speak to, and I commend you for it. I have been on both sides of the issue. I have been on the side of labor as a labor union lawyer; I have been in management as an employer of many people, and I have always heard it as a one-side kind of issue. And I commend you because I think you are like a breath of fresh air to this subject, when you talk about labor-management cooperation being necessary to move this country forward competitively.

I want to say to the members of the committee that we will have 5-minute rounds. Before you came in, I had indicated that the Sec-

retary is due over on the House side at 10. I think we'll have time for just one 5-minute round apiece, and then we'll have to let him go, but we are very grateful to him for being available to us this morning.

Mr. Secretary, you have championed labor-management cooperation as a critical component of our efforts to improve U.S. competitiveness. What effect do you think enacting this legislation will have on labor-management relations? Do you think it will be helpful? Do you think it will be hurtful? Some in management claim that it will be very negative in its impact.

Secretary REICH. Well, during the last 8 weeks, Mr. Chairman, I have talked extensively with management about this. Some do fear that this will be hurtful. I remind them that before the 1980's, it was very rare for any management to resort to the use of permanent replacements and that the 1980's were marked by hostility, as I have said in my opening remarks.

But I can tell you this, also, that many chief executive officers have come up to me in private, and they have said to me, "This is exactly the right way to go. We would never think about hiring permanent replacement workers. That is a sign of management failure."

The only reason that you don't find more of them testifying and more of them being public about it is that many of them feel that their colleagues are a little concerned, and there is perhaps a little bit of peer pressure.

With the best managers, best management techniques in this country, no, you don't find the hiring of permanent replacements. You don't find an attempt to intimidate or coerce. You don't find even the threat to hire permanent replacements, because as I said, that undermines the very fabric of the relationship between workers and managers, that undermines the conversation that workers and managers have to have, whether in a union context or any context, about the future of their working conditions.

Senator METZENBAUM. I think all of us at this table, whether we have a point of view more sympathetic to labor or to management, would agree that labor unions in this country have been a positive force with respect to moving the economy forward and bringing us to the economic level where we are at the present time. Do you have an opinion as to whether or not the very existence of the labor movement could be jeopardized if we continue down this road of striker replacements, given the bitterness that ensues when striker replacements are brought in?

Secretary REICH. Well, let me say, Mr. Chairman, that the entire framework of collective bargaining upon which peaceful and productive labor-management relationships are premised has been threatened during the 1980's especially by the use of permanent replacements; and therefore, it seems to me that this practice, not only in terms of management, not only in terms of long-term profitability, but also in terms of long-term competitiveness of the United States, is not advantageous. It is not advantageous to anyone.

Senator METZENBAUM. Do you have an opinion as to any other single aspect or factor in labor relations that has been more inimical to positive labor-management relations than the development

since the PATCO strike of the use of the threat or actually utilization of striker replacements?

Secretary REICH. Well, if you gave me a couple of days, I might be able to come up with another set of techniques that were more inimical to peaceful and cooperative and collaborative labor-management relations, but undoubtedly, this sword of Damocles hanging over the heads of workers has frustrated collaborative labor-management relationships. There is no question in my mind about that. It is not that we have had fewer strikes. We have had more bitterness, we have had less trust, we have had more sense of employee betrayal.

And I want to emphasize one thing again, and that is the notion of poisoning the well. We have a lot of employers, a lot of managers in this country who would never think of doing this, but we built up a culture of distrust because of the few managers and the few companies that have employed the utilization of permanent replacements, and that distrust because of the use in those rare occasions during the 1980's, those very, very highly visible occasions, has poisoned the well for an awful lot of managers who would never think of doing it. It is a practice that makes it more difficult to form a partnership generally between labor and management, even in the best-run companies.

Senator METZENBAUM. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Secretary Reich, I am very interested in the commission you recently established and how that commission's mandate really relates to S. 55, this particular piece of legislation.

One of the purposes of the commission, as I understand it, is to determine "whether current laws and collective bargaining practices should be changed to enhance cooperative behavior, improve productivity and reduce conflict." Now, I appreciate your desire and your push to get more cooperative and collaborative efforts between management and labor. First, however, can you explain why as a policy matter you are pressing for passage of S. 55, a fundamental change in labor laws that many of us feel would stand 55 years of labor law on its head at the same time the commission is charged with studying that law to see if it needs to be changed? Don't you think this may be just a little bit backward; kind of like putting the cart before the horse?

Secretary REICH. No, not at all, Senator.

The President, after having reviewed an enormous amount of evidence, testimony, data, analyses, studies, presented to the 102d Congress, concluded that the permanent replacement of striking workers is not an advance at all. In fact, if anything, it sets back the cause of labor-management cooperation.

He and I, this administration, want to close the book on that and move forward. The commission is about moving forward. It is about gathering evidence, data and analyses which are not now available about the future, about experiments we see just beginning to occur in the best-run companies. And I can give you chapter and verse, I can cite a number of those best-run companies like Xerox, National Steel. These companies would never consider the permanent replacement of striking workers.

Senator HATCH. Most large companies do not; in fact, most companies do not. Very small percentages ever exercise their rights under the Mackay doctrine. But as a practical matter, the commission is to begin its work quite soon. And assuming that S. 55 does not become law immediately, is the commission supposed to look at collective bargaining as if S. 55 were already law, and if so, how do they evaluate collective bargaining without any data or experience regarding the impact of this major change in the law?

Secretary REICH. I am not going to tie the hands of that commission. The President asked Secretary of Commerce Ron Brown and I to set up a commission to look to the future to improve labor-management relations as one way, as one step along the road to closing the book on a period of hostility and distrust—again, to gather evidence and data, to analyze new evidence about what can be done.

This issue before us now on the permanent replacement of striking workers is not a new issue. You had extensive hearings—in fact, I have read the testimony, I have read the transcripts, I have read analyses. This is not a new issue. We don't need a commission. The Secretary of Commerce and I, along with the President, are clear on this point, and the President is also clear on this point; the President supports this legislation.

Senator HATCH. Well, it is a very, very important change in the law if that's the case. The fact of the matter is all sides in this debate have consistently stressed how the fundamental use or nonuse of permanent replacements is to the right to strike and to collective bargaining. The unions have an absolute right to strike; but management has the right to protect its business. While the right to replacements is rarely used, but as a general rule management has a right to hire permanent replacements in order to save their business. This has been the union's number one legislative agenda item, and it, of course, overturns a U.S. Supreme Court decision, lower court and National Labor Relations Board decisions. How could anybody suggest that this type of a change doesn't have profound effects on our labor laws, and the way we do business in this country, and the delicate balance between management and labor when it comes to collective bargaining? The union has a right to strike, management has the right to use the leverage of permanently replacing people in order to save their businesses. It is the only risk that the union people who go on strike have to face. If they go on strike, then they have to face the risk that they may be permanently replaced, although it is hardly ever used in this country—it has been used, and it has been used to save some companies.

That's the thing that is bothering me, that it is so important these commission members really should have to look at it before there is a push on to pass it into law.

Secretary REICH. Senator, if I may, a couple of points. No. 1, even under the proposed law, management still has the option, as it has before, of using temporary replacements, lockouts, stockpiling——

Senator HATCH. You and I both know that doesn't work in many instances.

Secretary REICH. But let me stress again, Senator, that according to the studies I have here—the Wharton and Perry study, the GAO report, the Gramm study and so forth—and also according to our experience, the average experience of the average worker, the public's understanding of what happened during the 1980's with regard to some of these major, major strikes in which permanent striker replacements were used or were threatened, there can be very, very little doubt that before the 1980's this was rarely used. During the 1980's, we went through a period and have gone through a period of extremely stressful and hostile labor-management relations. The climate has changed.

Now, again, I don't want to say that it was the PATCO strike specifically. Some people say that it was the PATCO strike. Other people say that it was the wheeling and dealing of the 1980's that caused the short-termism. But you know as well as I do that there is a great deal of consensus out there that labor-management relations changed during the 1980's.

Senator HATCH. Well, let me just make one comment——

Senator METZENBAUM. I'm going to have to interrupt. Your time is up.

Senator HATCH. I want to make one comment—look, I'm ranking on this committee.

Senator METZENBAUM. Don't be rank.

Senator HATCH. I will not be rank, but I am ranking.

I have to say this, that the PATCO strike really doesn't play here because those were government employees who did not have the right to strike. Now, the fact is that many in the small business community—where there may be some use occasionally, but only less than 4 percent of all strikers—many feel that given the union's right to strike, business must have the right to at least force collective bargaining by suggesting that there is a right to hire permanent replacements. They feel that given that unions have a right to strike, if they don't have the right to replacements, unions will not only have a right to strike, they'll have a right to win every strike. And there will be nothing that the business people have as leverage to get unions to the collective bargaining table other than losing their business or caving in to every union demand. Those are the options, and that's what is worrying a lot of people out there in the business——

Senator METZENBAUM. Senator Hatch, you are imposing on Senator Thurmond's time. He is not going to have an opportunity to speak if I don't cut you off.

Senator HATCH. Well, wait a minute, wait a minute. This is an important issue.

Senator METZENBAUM. I know. I understand the importance.

Senator HATCH. It is a major, fundamental change in labor law——

Senator METZENBAUM. I understand that.

Senator HATCH. —and what you seem to be saying is we're going to have 5-minutes to talk to the person who is the principal spokesperson for this. Now, I don't mind that, but I want to be able to make those points, and with that, I will stop.

Senator METZENBAUM. Thank you. I am just trying to be fair to all the members of the committee.

Senator HATCH. Fine.

Senator METZENBAUM. Senator Wellstone.

Senator WELLSTONE. Thank you, Mr. Chairman. I agree with the Senator from Utah that it is a critically important issue. I suppose all of us equally share in the frustration that we might not have more than five minutes right now, but I am sure that we are going to have an opportunity to have an ongoing discussion with the Secretary.

Senator HATCH. I don't think we will. This is going to be it.

Senator WELLSTONE. Well, OK.

Senator METZENBAUM. We'll come back.

Senator HATCH. This will be it.

Secretary REICH. My door is open; my phone is open. I invite every conversation we can possibly have.

Senator HATCH. You are a very decent man, and we think a lot of you, but still, this is an important issue and it should not be given short shrift.

Senator WELLSTONE. I have not heard anyone here say that it is an unimportant issue.

Mr. Secretary, let me pursue this discussion that you have been having with the Senator from Utah, Senator Hatch, and I'll come at it from a somewhat different framework, and then I have two quick questions, and I will stay within my 5-minute time frame.

I come at this from the perspective that the data, the empirical evidence is rather clear that if you look at this most recent decade of the eighties, we have seen a really rather major shift in balance of power between labor and management. Now, I don't think you look at this as a power equation, but when you want to think about the ways in which labor and management can work together cooperatively, you want to have some kind of contract that assures that there will be high morale, that they are copartners and coequals in helping to build this economy.

I think that's what this is all about, and I prefer to look forward as well. I think the evidence is in on what has happened as a result of permanent replacements.

Let me ask you this. First of all, could you spell out in a little more detail than you were able to do in your opening remarks the relationship you see between S. 55 and, if you will, at the macroeconomic level, economic performance in our country? You understand the connection I'd like to see you make——

Secretary REICH. Yes, I do.

Senator WELLSTONE. —because I think this is critical.

Secretary REICH. I think that it is critical, Senator. There is a very important relationship. We have in this country now a macroeconomic problem. The President has submitted to Congress a proposal to deal with those macroeconomic issues. The proposal, as we all know, attempts to move this country from a country focused on the present to a country focused on investment, both public investment and private investment.

But even if we get that macroeconomic framework correct, even if we line up that macroeconomic framework so that we do move from an economy based on the present to an economy based on the future, we still have to deal with our workplaces and our work force.

I am going to spend a great deal of effort, almost all my energy, over the next few years trying to make sure that we have a work force ready and prepared to take responsibility in the workplace of the 21st century.

But we also have to look at the demand side of the equation, not just, if you'll pardon the expression, the supply side of the equation. And that demand side of the equation takes place in the workplace itself—what kind of collaboration, what kind of teamwork, what kind of respect, what kind of motivation.

The best American companies understand that their employees are assets to be developed, not costs to be cut. The best American companies understand that their employees are their entry barrier, their competitive advantage. Any other company can utilize the same machinery, can find their way around the same patents and technology. Any other country can move their manufacturing operation or even their service business abroad to find low-wage labor. The only unique asset for these companies that guarantees sustainable, long-term competitive advantage is the motivation and dedication and skills of their workers, often their frontline workers, because it is the frontline workers who have all the information. If you have to make changes quickly, if you have to be flexible, if you have to find new market niches, who is it who knows most about production and about markets? It is the frontline workers. You need their dedication, you need their motivation, you need their information.

That relationship has got to be a collaborative relationship, a positive sum relationship, for the good of the company, for the good of the economy, for the good of American competitiveness, and for the good of American workers. We have a potential win-win situation out there.

The problem is that right now, during the 1980's, we have built up so much hostility and so much distrust—even in the best companies, you have a residue of the distrust sloshing over from these terrible events. That's what we want to put an end to. And we see in the 1980's, regardless of what the law was before, that in the 1980's, the culture changed—whether it was the PATCO strike, or an era of wheeling-dealing paper entrepreneurialism—I don't know exactly what it was, but the evidence is very clear that in the 1980's, the threat to use permanent replacements, the utilization of permanent replacements, and the degree of hostility and distrust increased markedly. We want to put an end to that era. That is what this is all about.

Senator WELLSTONE. Mr. Chairman, I am going to be out of time, so——

Senator METZENBAUM. You are out of time.

Senator WELLSTONE. —I am out of time. But let me just express the same frustration as Senator Hatch in that I have a whole set of other questions dealing with the relationship between S. 55 and other labor law reform that goes in the same direction. I look forward to having the opportunity to talk with you about this further.

Thank you.

Senator METZENBAUM. Senator Kassebaum.

Senator KASSEBAUM. Mr. Secretary, I know that indeed you do care a great deal about both sides of the equation, both from man-

agement and labor. But I respectfully disagree with your interpretation of what S. 55 will do. I think it will turn the clock back to an era where we saw a bitterness and divisiveness and prolonged strikes, particularly at a time when there is such hostility that is built in and uncertainty. I think that has come not from striker replacements, but from the uncertainty that exists about whether anyone is even going to have a job.

When we look at General Motors, it isn't striker replacement that has been the problem. It has been the thousands of workers who have simply been dismissed, not because of any lack of performance on their part, but from the changes that are taking place in our industrial sector. I think that is what has caused this uncertainty, not this hostility that is in the work force because of striker replacement.

Secretary REICH. If I may respond, Senator, undoubtedly, since 1989, particularly the current recession, there has been a great deal of downsizing that has caused a great deal of stress on our economy and for our workers. But the era of hostility and bad labor-management relations dates from far before 1989.

According to the studies I have before me—the GAO report, the Gramm study, 1984, 1985—these are periods where we had an expansion. These are periods in which new jobs were being created. These are periods in which the economy was—although we were creating an enormous debt at the time, and some of us knew we were going to have to pay the piper—at least on the surface doing pretty well, and yet we still faced a period of just extraordinary, extraordinary hostility.

Again, look at the Phelps-Dodge strike in 1983. I have a list here of strikes, of work stoppages, and even if they don't end in unfair labor practices, because often they did not end in unfair labor practices because it was not clearly unfair labor practice, the point is that we had even before the era of downsizing between 1981 and 1989 a great deal of enmity building up, and that enmity seems to correlate directly with the threat to use permanent replacements.

Senator KASSEBAUM. Mr. Secretary, weren't there more strikes in the seventies than there were in the eighties?

Secretary REICH. In terms of numbers of strikes, there may have been more strikes in the seventies than in the eighties, but that doesn't tell us very much about intimidation. In fact, what I am talking about now is not so much the number of strikes, but the climate of labor-management relations. It may be that one partner in that partnership was coerced and intimidated into relative quiescence. There is debate over this point in terms of how many strikes, but the most important point here is that you cannot have a partnership in which one partner is bullied and intimidated into relative quiescence. That's not what I would call a partnership. That is one reason that we have had this degree of enmity building up.

Senator KASSEBAUM. Mr. Secretary, before my time runs out, let me just ask a question that I think really goes in many ways to the heart of the matter, and it is something that you care a great deal about, and that is job creation. I think it is very important if the Department of Labor has not done so that they study S. 55 and evaluate it in the terms of job creation. And I would just like to

ask you if you are familiar with a study done by the University of Toronto by Morley Gunderson that concluded that the prohibition of hiring replacement workers in Canada increased both the number of strikes and the duration of strikes. Wouldn't more and longer strikes have a significant economic impact particularly on job creation, which I think is the top priority of this administration and of us here?

Secretary REICH. Senator, I am familiar with the Gunderson study. It should be noted that that Gunderson study, which is a study of strike activity in Quebec before and after enactment of a new law which banned both the permanent and temporary replacements—now, again, I want to stress that is not what we are considering today; we are considering a law that would ban permanent replacements, and so that particular study is not, with all due respect, apt to our current situation.

Senator KASSEBAUM. Well, I have run out of time, but I would just like to say, Mr. Secretary, that I really do believe this bill drives a stake in the heart of our efforts, that I believe have been increasing, for cooperation. That isn't to say there aren't better ways to look at collective bargaining, to give a focus to that direction, but I think this is going exactly the wrong way.

Senator METZENBAUM. Thank you very much, Senator Kassebaum.

Senator Harkin.

Senator HARKIN. Thank you. I have a statement I'd like to submit for the record.

Senator METZENBAUM. All statements will be included in the record as if orally delivered.

[The prepared statement of Senator Harkin follows:]

PREPARED STATEMENT OF SENATOR HARKIN

Mr. Chairman, I want to commend you for holding this hearing on legislation that is long overdue, S. 55, the Striker Replacement bill. I also want to welcome Secretary Reich once again to the committee and thank him and our other witnesses for coming.

S. 55, of which I'm pleased to be an original cosponsor, will restore a fundamental principle of labor-management relations—the right of workers to strike without having to fear the loss of their jobs.

Over the past decade, a worker's right to strike has been undermined by management's practice of hiring permanent replacement workers. Our workers deserve better. They deserve to be treated better than paper assets that are discarded when labor disputes arise. The right to strike—which we all know is an action taken as a last resort—is fundamental to preserving workers' right to bargain for better wages and better working conditions.

As a nation we have a choice—continue down the path of lower wages, lower productivity, few organized workers or to take the option pursued by our major economic competitors, of high wages, high skills, and high productivity. If we want to pursue that high skill path, we must do it with an organized work force. We can't do it with the destructive management practices of the past decade that have been fostered by the hiring of permanent replacement workers.

President Clinton is firmly committed to pursuing the high wage, high skill path and I am very pleased that the administration is supporting this important legislation. I hope that we can work together to move S. 55 through the Senate and the House and on to the President.

Thank you.

Senator HARKIN. I think I have to pick up—I wasn't going to ask this question, but listening to the Senator from Kansas, I have to pick up on this point. Talk about driving a stake in the heart of something. Nothing has driven a stake into the heart of American competitiveness more than the action by companies to dismiss workers who have worked there for a lifetime, and to dismiss them because they want to hire nonunion workers and to pay them less. That has reverberated throughout our entire economy.

I would say to the Senator from Kansas who is a well-meaning and I know compassionate person, that sometimes, as that old saying goes, you've got to walk in the moccasins of a person; you've got to put yourself in their shoes.

I saw what happened to my brother, who worked for a company for 23 years. He gave that company the best years of his life. The first 10 years he worked for that company he didn't miss 1 day of work, and he wasn't late once—in 10 years. In 23 years, he missed 5 days of work because of snows in Iowa. He got all kinds of awards for productivity. Twenty-three years. He belonged to United Auto Workers, a small union there, and in all the years they were organized at this plant, they never had one strike, never had one labor dispute. But then, when my brother was in his 50s, the owner of the company sold the company to a group of quote "investors" who bought it and then decided that they wanted to increase their profits. And one way they could do that would be to get rid of the union and hire replacement workers and pay them less.

So when the contract came up for negotiation, the company refused to negotiate in good faith, forced a strike, they brought in replacement workers, and my brother and all of his coworkers were out of work. And that strike dragged on—and it was very mean and very vicious—for a long time, until they busted the union, and my brother at the age of about 54 found himself out of work.

My brother said two things to me in my life that I will never forget. When he was sent to the Iowa School for the Deaf and Dumb, he said, "I may be deaf, but I am not dumb." And the second thing he said to me was that when this strike happened, and he was put out of that job that he loved so much—and he was just a working stiff, a blue-collar worker, worked on a machine—he said to me, "I feel like a piece of equipment that they have used up and thrown out on the trash heap in the back, like that's what they've done to me."

When you see something like that happen to someone you love very much, you've got to ask what is happening in America between labor and management that someone would do that to a human being, just throw them out after that much time.

So that is why I have been so interested in this legislation, because I have seen it, I have been in those shoes. I know what it means to Americans to have that happen. It isn't right, it isn't fair,

it isn't just to treat workers like a piece of equipment or a piece of machinery and to use them up like that.

I say it's time to ensure that my brother and people like him—and I've got to tell you, it didn't just destroy my brother—he never got over it—it didn't just destroy him, but all the other coworkers and their families and their friends. And the message that was sent out from that was why bust your ass for that company, or for any company? Why go to work through the snowstorms? Why be on time 10 years in a row when, after 15 or 20 years, they are just going to throw you out anyway?

So the kind of loyalty and hard work that was engendered among that work force was destroyed, not only for them, but for the people who came after them. They had no loyalty there, because they saw what had happened to the people before, and that's what they thought could happen to them.

So that is why this legislation is so necessary. It is time to stop that practice, not in a confrontational way, but to understand that we cannot treat workers like pieces of equipment and machinery any longer and depreciate them out and throw them out on the trash heap of life. It is time to give them the dignity and the worth that they have and that they should have in our society, and I'll tell you the productivity will go up.

Well, I said my piece, and you didn't get a chance to answer a question, but I am sorry to the Senator from Kansas, but when she said those things, it just brought forth all these memories that I have of what happened in my own family, and I'm sorry to have to talk about it in that manner. But I think we just have to keep in mind that these aren't pieces of machinery.

Senator METZENBAUM. Thank you very much, Senator Harkin. Your commitment and your concern for your brother and his condition helped us pass the Americans with Disabilities Act, and I think your strong statement referring to his plight and the impact of striker replacements on his life may help us pass the Workplace Fairness Act.

Thank you very much.

Senator Jeffords.

Senator JEFFORDS. I'll defer to Senator Thurmond, Mr. Chairman.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Secretary, we are glad to have you with us. I have just a few questions, if you could answer them very briefly, since the time is limited.

Wouldn't this legislation significantly tilt the balance in favor of organized labor by limiting the ability of employers to operate during a strike and by favoring striking employees over those who choose to exercise their statutory right not to strike?

Secretary REICH. Senator, my answer is no, for two reasons. One, because the legislation still permits employers to use many techniques such as the lockout, such as using managers, such as building up inventories, such as using temporary replacements. Management still has many tools in its arsenal. But I want to go back to a more basic point here, and that is that between——

Senator THURMOND. Now, anything you've already said, you need not cover again; if you could just be brief.

Secretary REICH. I'll try to be very brief. It is hard for me. I am a former university professor, and I think in terms of 40-minute intervals.

Senator THURMOND. Well, professors can talk as long as they want to because they have the right.

Secretary REICH. I will be very brief. The fact of the matter is that before the 1980's, management got along quite well with rarely, if ever, using this technique. During the 1980's, in some very, very visible instances, management used the technique, threatened to use the technique, and labor-management relations deteriorated as a result.

Senator THURMOND. Isn't it true that this bill enhances the interests of one group under the law at the expense of American businesses, workers and consumers?

Secretary REICH. Again, Senator, I would say that our goal must be to create a very, very different climate in American business, in which workers and managers are working together collaboratively. I don't see how you can create a true partnership in which one of those partners is coerced into being a partner with the equivalent of a gun at its head.

Senator THURMOND. Isn't it true that what proponents are now seeking legislatively is not protection of the right to strike, but the ability to force employers to accept union demands at the bargaining table whether reasonable or unreasonable?

Secretary REICH. No, again, Senator. Not only does management have a lot of levers, but don't forget, employees don't want to strike. The strike is a last resort. The strike is a means of ensuring that collective bargaining is in good faith. Employees suffer as a result of strikes. They are putting their jobs and their livelihood on the line. They are often sacrificing directly during the strike in terms of their wages and their benefits. The strike is not something that employees want to occur.

Senator THURMOND. Isn't it true that under current law, if a strike is caused or prolonged by an employer's unfair labor practice or practices, such as its failure to bargain in good faith, striking employees cannot be permanently replaced?

Secretary REICH. Under current law—under current law—striking employees cannot be permanently replaced if the management is not bargaining in good faith. That is, under current law, it is entirely lawful for employers to replace striking workers, but it is not lawful for employers to fail to bargain in good faith.

Senator THURMOND. Isn't it true that if S. 55 became law, it would insulate striking employees from the risks that traditionally have acted as a check on the voluntary decision to strike over economic issues and would free organized workers to command a price for their labor without regard to the market forces of supply and demand?

Secretary REICH. No, again, Senator, for a number of reasons. If you look at the history of labor-management relations from the time of the Wagner Act right through to the 1980's, you see that we developed a system, a social compact in which labor and management did negotiate; there was bargaining in good faith. We did

have periods of labor problems, but we basically created a system in which employees did have a voice, and that voice was respected.

During the 1980's, a lot of that disintegrated, not because of widespread misuse, Senator, but because of a few bad apples using the striker replacement to coerce, intimidate and sometimes actually to replace striking workers permanently. That has poisoned the well. That has changed the climate and relationship between labor and management.

Senator THURMOND. My time is up, but I just want to ask you this. Isn't it true that the present law has been in effect for 55 years, and this country has made great progress industrially, more than any country in the world—and why should we change it?

Secretary REICH. We are talking, Senator, about industrial practices, not just about laws and what is allowed, what is not allowed. We are talking about industrial practices. And if you look at the studies I have here—the Wharton study, Perry study, the GAO report, the Gramm study—I can cite you a number of studies, but my time is limited, and I don't want to take your time, a number of studies which show that there was a great deal of hostility; labor-management relations did deteriorate in the 1980's, and we all know the instances. We all remember Eastern Airlines, 22 months. The company announced the intention to permanently replace machinists and flight attendants. We all remember Greyhound, 12 months. The strike was never resolved. The company announced its intention to permanently replace its machinists. There was an operating loss of about $105 million for that company, and Greyhound permanently replaced its workers. Pittston, 10 months. I could go on. New York Daily News. Caterpillar.

These are landmarks, sad landmarks, of the 1980's. This is not what we had before.

Senator THURMOND. Thank you.

Mr. Chairman, I ask unanimous consent that my brief statement follow that of the ranking member.

Senator METZENBAUM. Without objection, the statement will be included in the record.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF SENATOR THURMOND

Mr. Chairman, it is a pleasure to be here this morning to receive testimony concerning "striker-replacement" legislation. I would like to join my colleagues in welcoming our witnesses here today.

I am concerned that this legislation proposes an unwarranted shift in the economic balance of risk that has been shared for many years by management and organized labor in relation to labor disputes.

As you may know, current law prohibits employers from hiring replacements if the strike is over the employer's unfair labor practices, such as the refusal to bargain in good faith. However, current law does permit companies to hire replacements if the strike is over purely economic issues, such as an hourly wage rate. What concerns me about this legislation is it would change this latter part of the law. It would prohibit the hiring of replacements when workers strike over economic issues.

Mr. Chairman, again, it is a pleasure to be here, and I wish to join you in thanking our witnesses for being here today. I look forward to reviewing their testimony.

Senator METZENBAUM. I just want to say to my friend from South Carolina that although the law may have been the same for 55 years, permanent replacements were seldom used until the PATCO strike in 1980, when Ronald Reagan replaced the PATCO employees and suffered upon them a penalty greater than has ever been imposed upon any workers anywhere in this country. They are still barred from coming back to work. They had a greater penalty for going on strike than for committing murder in many places in this country. So it isn't a question of the law. The law was there, but the employers didn't start to use it until 1980 after the PATCO strike.

Senator Kennedy.

Senator THURMOND. According to your side, Ronald Reagan did nothing right, did he? [Laughter.]

Senator METZENBAUM. I am trying to recollect. There may have been something. I can't remember anything. There may have been something, but I don't remember anything. [Laughter.]

Senator KENNEDY. Mr. Secretary, I know that you have to go and testify over in the House. Just quickly, on the unfair labor practice, the reality is that by the time you are able to demonstrate an unfair labor practice, most of those workers have long been out of work in any event because of the time that it takes to prosecute the unfair labor practice complaint. So while you can well say that they ought to be able to be replaced in an economic strike, even if they cannot be replaced in an unfair labor practice strike, in practical terms, and that's what we are talking about—we are talking about real people, real families, and the economic conditions in which they are existing—it is only fair to prohibit permanent replacements in economic strikes.

And it is so interesting to hear our friends say, well, let's go back to the old law. Well, you take that 1935 Wagner Act and try to pass that out today. We have seen what has happened over the period of time—the 1947 Taft-Hartley Act prohibited secondary boycotts. More recent court decisions favor union members who cross picket lines. The workers who support their fellow workers are the individuals who get penalized. There have been a whole series of actions which have been taken both legislatively and by the courts that have undermined that 1935 Act.

It is so interesting to hear our colleagues say let's go back to the old law. Well, that's what we are trying to do, in this instance, in the most important and basic issue—the economic strike.

Let me just ask this. On the issue of productivity, which is the key to our ability to compete and expand our employment base—good wages and being internationally competitive—can you tell us what the impact is of using temporary striker replacements in those industries where they have been used? Has it prolonged the unrest that has existed in those companies. What is the economic impact on the local community. And what is the impact on our national economy?

Secretary REICH. Senator, so far, I have been dwelling upon the impact of the utilization or the threat to utilize striker replace-

ments upon worker morale, loyalty, teamwork, and a sense of partnership. But you are alluding to another issue, and that is the facts; I have seen a number of studies showing that strikes tend to last longer with the threat or the utilization of striker replacements.

A study that I can refer to, for example, by——

Senator KENNEDY. Why don't we include it in the record.

Secretary REICH. Yes, I'll put it in the record, but let me just mention it because it is a very important study. Associate Professor Cynthia Gramm of the University of Alabama surveyed two random samples and found that indeed the use of permanent replacements did prolong strikes; it did not contribute to economic productivity, and it simply made matters worse.

Senator KENNEDY. And that has an adverse impact in terms of the local community, I imagine, as well as the national economy.

Secretary REICH. It certainly does.

Senator KENNEDY. And generally, in terms of our productivity.

Thank you, Mr. Chairman. I want to express our appreciation for the presence of the Secretary and thank him for excellent testimony.

Senator METZENBAUM. Thank you very much, Mr. Secretary. I know you are due over at the House at this time. You have been very cooperative. I am sure that you will be available to any of the members of this committee, as you have already been available to all members of the Congress, and I don't know of anybody who has had a more open door policy in dealing with Members of Congress.

Thanks for your cooperation. We look forward to continuing to work with you, and hopefully we'll move this piece of legislation shortly after the recess.

Thank you very much for being with us.

Senator JEFFORDS. Mr. Chairman, you sent me a very nice note.

Senator METZENBAUM. Oh, my humble apologies, Senator Jeffords. I sent him a note saying I wouldn't think of not calling upon him. I apologize publicly to you, Senator. It was a total oversight.

Senator JEFFORDS. That's all right.

OPENING STATEMENT OF SENATOR JEFFORDS

Mr. Chairman, fellow Members, ladies and gentlemen: It certainly is no surprise that at this early stage of the 103d Congress we are returning to the legislative debate on banning the hiring of permanent replacement workers. President Clinton made his support of such legislation clear throughout the election campaign, and Secretary Reich has reaffirmed the administration's commitment to the bill on numerous occasions since inauguration day. However, it seems to me that we did schedule and assemble today's hearing on very short notice. I guess it is a tribute to the seriousness of this issue that we have been able to put together such a distinguished panel of witnesses in that short time.

I understand that we are under some time pressure today, so I will keep my comments brief and ask that my full statement be printed in the record. The one point I do want to make is that I view it as putting the cart before the horse to create a commission to study the need for reform of our system of labor laws but to exclude the issue of striker replacements from consideration by that

commission. I would like to hear some attention addressed to that concern by the witnesses here today.

I will pay close attention to the testimony to be presented by the witnesses. Further, while I confess that I start as one who supported this legislation, I will keep an open mind on the scope and nature of the problem and the range of possible solutions.

Thank you for your testimony.

[The prepared statement of Senator Jeffords follows:]

PREPARED STATEMENT OF SENATOR JEFFORDS

No traditional labor law issue has recently so galvanized the actions of the interested parties as the legislative debate on banning the hiring of permanent replacement workers. While everyone can agree that this issue cuts to the very heart of the collective bargaining relationship, there is wide disagreement as to whether passage of this legislation will help or hurt the institution of collective bargaining.

Needless to say, we need to agree on whether there is a problem requiring a legislative solution before passing that solution into law. The Clinton administration has made it clear that it plans to take a hard look at our system of labor laws. Toward that end, a "blue ribbon" commission has been created with the mission of studying workplace cooperation and recommending ways of reforming worker/management relations to "create an environment within which American business can prosper."

From the outset of the legislative debate on this issue in the last session of Congress, I suggested that we need to open up a broad based discussion on the way in which labor relations disputes are resolved. I am a supporter of the American system of collective bargaining and I believe, for the most part, that it does a good job. However, that system works better for all concerned in times of economic expansion than it does in times of recession. This is elementary and quite understandable, just as is the desire to change the rules of the game when your side is not winning. But that is just not the way we do things, nor should we in this case.

I for one would be willing to explore the options which exist in the areas of alternative dispute resolution. We do have some history in this country on this issue. There are segments of the work force which have the right to bargain collectively but not the right to strike. In those instances, various systems have been devised for resolving disputes on which the parties themselves cannot agree. Perhaps it is time to begin moving away from the ultimate labor warfare of strikes, lockouts and replacement workers and toward some alternative system.

There are many aspects of collective bargaining that we might have productively pursued. As I voiced during those hearings, it troubles me that unfair labor practice strikers must wait so long for a resolution of their charges. Further, the sanctions against employers in those instances seem to me to be insufficient.

As I also noted during those hearings, the celebrated cases where permanent replacements have been used—the Daily News, Eastern, Greyhound—hardly seem to be models of successful corporate strategies. But maybe there is some value to looking at the special

circumstances of concessionary bargaining, if there is some way that we could agree to define so nebulous a term.

I think, too, that we should look at first contracts. Where there is no established bargaining relationship, perhaps a third party intermediary could serve a useful role. And as one who supported labor law reform in the late 1970's, I am certainly open to suggestions on ways to streamline the process of deciding whether or not a group of workers wishes to organize.

Perhaps the biggest revolution since 1938 has been the shrinking of our world. We were an insular power, one of many, and we emerged from World War II as the greatest economic power on the planet. It is not surprising, given that our country was spared from damage during the war. Nor is it surprising that our preeminence was eroded in the decades that followed the war as other countries rebuilt and retooled.

In 1938, we could afford to consider labor-management relations in isolation. In 1992, we no longer have that luxury.

I am not sure we have the luxury of wasting our resources—human and economic—on bitter strikes and lockouts. I think some businesses know this, and some unions do, too. Some of us in the Congress are coming to the same conclusion as well.

The newly established commission can look into all of these issues, and I would support it in doing so. However, I view it as putting the cart before the horse to create a commission to study the need for reform of our system of labor laws, but to exclude the issue of striker replacements from consideration by that commission. Passage of the present legislation will change the face of labor relations in this country. Clearly that is the intent, but is it in the best interest of the country? That is the question. I would like to hear some attention addressed to that concern by the witnesses here today.

I will pay close attention to the testimony to be presented by the witnesses. Further, while I confess that I start as one who has not supported this legislation in the past, I will keep an open mind on the scope and nature of the problem and the range of possible solutions.

Thank you for your testimony.

Senator JEFFORDS. Mr. Secretary, I always sort of stand in the middle of these things, and I have been trying to analyze this situation. I commend you for creating the Commission on Future Worker-Management Relations. I think that is important. But what concerns me is the rush to take up S. 55, having created that.

I say that because, for instance, I was very much against the way President Reagan handled the PATCO strike. I felt that they abused the workers in that case, and I think that may well have led Lorenzo and others on a vengeance to break unions. But that was in the eighties, in the early years, and even a little bit beyond, perhaps, and in most cases those things were disastrous, as you know. They ended up in bankruptcies, and the companies went under. And as you have recognized, this is not the general order of most companies.

I know there are some problems. Take the situation of Senator Harkin's brother. He said that there were unfair labor practices. But as you know, the ability to get appropriate and quick attention

to those unfair labor practices is a problem in those kinds of situations.

It seems to me that it would be better if we took a look at alternatives to some of the problems we have in this area and had your commission do that, rather than bringing back those wounds and pouring salt in them, that we suffered through in the eighties, so that we could look at perhaps alternative ways of resolving these problems, or limiting the cases in which you can hire permanent replacements in first strike situations or concessionary bargaining, rather than just changing the whole law which has worked for so long.

So I would ask you whether or not you don't find, especially with the new administration, that there is a different feeling among businesses now as to the use of permanent striker replacements, and if so, why do we want to try to revisit those terrible times when we were in such poor relations?

Secretary REICH. I think that's exactly the point, Senator. We don't want to revisit these terrible times. You talk about wounds—we want to heal those wounds, and we want to move on.

As I talk to many business leaders and chief executives across the country, I am struck by their repeated cadence: We would never think of replacing our striking workers permanently. That doesn't work. We know it doesn't work. I hear that again and again and again.

The problem is that there is a minority out there of executives which apparently do not believe that. And if the eighties are a guide to the nineties—and I have no reason to think that the eighties don't to some extent preordain the nineties unless we do something about it—we are going to continue to see an undermining of the trust and confidence that is necessary to move on to the next stage.

Now, the commission talks about the next stage; that's where we want to go. We want to talk about and move on to the next stage of labor-management relations. It isn't just the commission. I am going to be doing everything I possibly can to work with labor and management, not just organized labor. We have a lot of employees in other situations, not organized employees. They are also going to be receiving my attention.

But the 102d Congress has looked at this issue. It would be a different thing entirely if there were no analysis, no data, if there had been no debate, no testimony. But the President and I have looked at that analysis, that testimony, those deliberations, and the President has concluded that it is time to end this chapter, to close this wound, to prohibit the use of permanent replacements, and even the subtle intimidation that comes from having that as a possibility as it has so often been used in the 1980's, so that we can move on to the next chapter of labor-management relations.

Senator JEFFORDS. It seems to me the evidence is that there has been a declining number of strikes, and the very adverse results of those that use the permanent replacements. I just differ with you on the way to proceed. It seems to me also the recognition in the world that, because of the world markets, we have to have better labor-management relations in order to survive in the international community, and that it would be better to try and examine alter-

native methods of resolution of management problems and study that and doing something which has at least worked pretty well for the last 55 years. So I just disagree with the appropriateness of S. 55 at this time.

Secretary REICH. Senator, if I could just emphasize one other point. Again, I have before me a number of studies, and you probably have them as well, but I want to point to one study, a GAO report, which surveyed employees, in which three out of four union representatives were surveyed, and it was their opinion that the use of the intimidation, the use of the threat to utilize permanent replacements increased substantially during the 1980's.

So the actual number of strikes doesn't tell us much about the climate of labor-management relations; it doesn't tell us much about the climate of trust, the possibility for partnership. If there is the view out there among so many workers that this possibility, this intimidation, has been utilized, then we can't build on the trust and confidence we need to move to the next chapter of labor-management relations.

Senator JEFFORDS. I'll just end by saying that I still disagree. I think the opposite is true in the sense that that is the past, and let's hope for the future.

Secretary REICH. Well, I hope for the future. That's why I am here; I am hoping for the future.

Senator METZENBAUM. Thank you very much, Mr. Secretary. We look forward to continuing to work with you, and we'll let you get over to Representative Bill Ford and his committee now.

Thanks a lot.

Secretary REICH. Thank you, Mr. Chairman.

Senator METZENBAUM. Our next witness is Thomas Donahue, secretary-treasurer of the AFL–CIO. And as Mr. Donahue is coming to the witness table, I would point out that he is going to follow Secretary Reich on the House side, so we'll have a little more time for him than we did with Mr. Reich, but we have a number of other witnesses as well.

I should say in his coming to the stand that we have a number of witnesses from labor who wanted to be heard, and the chair felt that we just could not hear from all of them, and so we chose one.

One particular one that the chair felt would be important to hear from is a long-time personal friend of the chair's, Bill Castevens, secretary-treasurer of the UAW, who led the Caterpillar strike. Bill and I have been friends for many, many years, and I really felt that I would like to have him come forward, but I didn't see how I could bring him without bringing a number of other friends from the labor movement, so we agreed to settle on you, Mr. Donahue. I know you have two of your right hands with you. Please proceed.

STATEMENT OF THOMAS R. DONAHUE, SECRETARY-TREASURER, AFL–CIO, WASHINGTON, DC, ACCOMPANIED BY BOB McGLOTTEN, DIRECTOR, LEGISLATIVE DEPARTMENT, AND LARRY GOLD, GENERAL COUNSEL

Mr. DONAHUE. Thank you very much, Mr. Chairman.

I am Tom Donahue, secretary-treasurer of the AFL–CIO. I am accompanied by Bob McGlotten, the director of our legislative de-

partment, on my left, and Larry Gold, the general counsel of the AFL–CIO, on my right.

Mr. Chairman, we thank you for inviting us to testify. We have submitted a statement that discusses our position in detail. I'd just like to touch upon some of the points that that statement makes, and I'll try to do it very quickly.

Senator METZENBAUM. I think you know, Mr. Donahue, and all witnesses have been informed, that there is a 5-minute time limit.

Mr. DONAHUE. Yes, sir.

Let me begin by noting, as was noted earlier, that this is not a new issue for the committee. It is 2 years and 18 days since I testified before you last on this issue, and we revisit it only because this bill fell short of invoking cloture in last year's debate, while it was clear that there was a majority which would have supported the legislation.

Now, in a different political climate, with a new administration that has expressed its strong support for the Act, we hope and expect that the early wisdom that this subcommittee and later the full committee showed will indeed carry the day.

The purpose of the legislation is clear enough. It would prohibit the permanent replacement of strikers, would overturn the judicially created doctrine that has countenanced what has been described as a destructive employer practice and one which has come to threaten the very essence of free and productive collective bargaining.

The permanent replacement doctrine empowers employers to reject the very system of collective bargaining that the law claims to encourage. It renders the peaceful and equitable resolution of labor disputes more difficult. It imposes costs not only on the workers involved, but on society as a whole, and it validates the view of the least enlightened employers, that workers can be treated as disposable resources to be exploited for short-term profit and then discarded if they fail to respect unilateral employer control of their work lives.

Where the strategy has been used, it has inflicted great hardship on workers, their families and communities, and the examples have been well-cited before this committee.

The people who oppose this legislation have argued that it undermines our economic competitiveness, it overturns 50 years of what are called balanced labor relations arrangements, and it grants to workers a license to strike irresponsibly and with impunity. Not a single one of those points can withstand scrutiny.

As to competitiveness, as the Secretary just testified, nine of the ten major industrialized nations prohibit by law or custom the permanent replacement of strikers; they honor the pledge of a right to strike. Among those nations are Japan and Germany, which have not been noticeably disadvantaged by the practice in their ability to hold their own in world markets or to be competitive.

Many of the American firms which claim great concern about this piece of legislation operate in Canada under laws which prohibit the permanent replacement of strikers.

Competitiveness, as the Secretary has just testified, clearly depends much more on a highly-skilled and productive work force

and on stable and cooperative labor relations than it does on an ability to discard workers or treat them as disposable.

As to overturning some supposed 50-year balance, when the permanent replacement option was first devised by the U.S. U.S. Supreme Court in 1938, it had little effect because in 1938, workers had rights that allowed them to respond effectively to that employer weapon. In the following years, the successive changes in the laws and in the cases have shifted that balance very clearly and have made the use of permanent replacements by employers a far more potent weapon.

Finally, as to the need to protect employers from irresponsible strikes, this is not a bill which leaves any employer exactly powerless. At the very least, he can operate during a strike, he can use supervisors, temporary replacements, contract out, stockpile, apply a series of other tactics in order to blunt a strike's effects.

Those are the tactics used in most strikes even today, because most employers will not use the permanent replacement strategy.

Second, workers simply do not lightly choose to strike and give up substantial and needed income. This is the worst fallacy that has been offered in any discussion of this subject. Workers live by their weekly paychecks, and a strike is not a welcome prospect; it is only a last resort. And the discussion that some change in the law would have people striking willy-nilly, I think is unworthy.

The debate over the bill is ultimately not about any of those concerns raised by our opponents. It is rather about two colliding visions of the role of workers in society. One is of a workplace where managers have total control while workers have few rights, no voice, and even less security. In that vision, the workers are not active participants; they are disposable commodities.

The other vision is of a workplace where there is a cooperation and a respect between management and workers. Workers are valued; management understands the importance of investing in their well-being and productivity. There are sometimes conflicts between the two sides, but there are ways to resolve those conflicts, and in the end, both labor and management know that they have a relationship that is worth sustaining. That is the vision that was the foundation of the National Labor Relations Act in the 1930's. It has served this country well when it has been heeded, and it is the basis of the Workplace Fairness Act.

Senator METZENBAUM. Mr. Donahue, can you wind up, please?

Mr. DONAHUE. It is for all of those reasons, Mr. Chairman, that we urge this committee and the Congress to enact the Workplace Fairness Act of 1993.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Donahue follows:]

PREPARED STATEMENT OF THOMAS R. DONAHUE

Mr. Chairman, my purpose in appearing before this subcommittee today is to State the AFL–CIO's appreciation to you and to the cosponsors of S. 55 for introducing this important measure and to urge prompt, favorable action on the bill.

S. 55 would overturn the judicially created "permanent strike replacement" doctrine first stated in *Labor Board* v. *Mackay Co.*, 304 U.S. 333 (1938), and more recently amplified in such decisions as *Belknap* v. *Hale*, 463 U.S. 491 (1983) and *TWA, Inc.* v. *Flight Attendants*, 489 U.S. 426 (1989). Under that doctrine, even though it is unlawful for an employer to discharge his employees for engaging in a lawful economic strike, it is lawful for the employer to "permanently replace" such employees.

Very simply stated, the *Mackay* doctrine is contrary to the Federal labor law's most basic principles and purposes. It sanctions a harsh injustice against working people who exercise their legal right to strike, and it provides employers with a far more destructive economic weapon than any that employees have—or would desire to have—in their arsenal.

The *Mackay* doctrine is equally contrary to the national interest in long-term labor and management relationships, and in investment in our human resources. Permanent replacement is not a means of building a quality work force, of investing in workers' skills, or of developing relationships built on mutual respect. It betrays a management approach whose premise is that workers are a disposable resource, to be exploited for short-term profit, and then, if the worker questions the employer's unilateral authority, discarded.

In these ways, the *Mackay* doctrine poisons our society's efforts to develop healthy and stable collective bargaining relationships, to reduce industrial unrest and bitterness, and to promote more humane and less exploitive workplaces.

I chose the word "poisons" in the preceding sentence with some care. I am told that the multitude of toxins which threaten our health typically do their deadly work after varying latency periods. So it is with erroneous and unwise judicial decisions. Depending on the interaction of a host of variables, the full effects of a flawed decision may not be felt for years or decades. Whatever was true in the past, at this juncture the evidence makes it clear that the use of the *Mackay* doctrine now threatens the very vitals of free and productive collective bargaining.

1. The National Labor Relations Act was a response to the widespread industrial disruption and instability caused by employer refusals to recognize their employees' right to form unions and bargain collectively. As the 1935 Congress declared, the "denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . ." NLRA §1, 29 U.S.C. §151.

Congress passed the NLRA to provide a procedure to guarantee employees their own-free choice on union representation, so that representation disputes would no longer need to be settled through bitter strikes and picketing. Congress hoped and expected that, where the employees chose a union representative, the employer would respect the legitimacy of their decision and negotiate in good faith toward a mutually agreeable labor contract settling wages and working conditions for the contract's duration.

Under this NLRA system—so long as the business continues and unless the employees evidence a dissatisfaction with their representative—the employer and union are expected to renegotiate their contracts periodically in response to their changing understanding and appreciation of their changing needs. Congress certainly assumed that strikes would periodically occur in the normal course of collective bargaining, as parties would seek to pressure each other to reach accommodations; but Congress also assumed that strikes over these mediate issues would be far less bitter and disruptive than those of the pre-NLRA era. Over time, Congress believed this system would generate stable institutions of collective bargaining that would prove beneficial to workers and employers alike, as well as to the society at large.

The theory of the national labor policy, then, is twofold: First, employees have a right to pursue their interests collectively without being subject to employer reprisals for their concerted activities. Employees have this basic right both in the context of securing union representation and in the context of bargaining for better wages and working conditions.

Second, the issue of union representation is to be separated out from the substantive issues concerning how an enterprise is best run in the mutual interests of its owners and employees. The former—which involves the replacement of unilateral employer control with the system of collective bargaining—arguably involves no mutuality of employer and employee interests, and, accordingly, it is to be settled through a government-administered procedure for determining employee free choice. The latter—as to which there is, beyond any doubt, a mutuality of employer-employee interests in a prosperous enterprise—is to be settled not through any government ruling but through the system of "collective bargaining, with the right to strike at its core," *Bus Employees* v. *Missouri*, 373 U.S. 74, 82 (1963).

It is an unhappy truth that a large number of American employers have never accepted the right of employees to freely choose a union representative and establish a system of collective bargaining. These employers have fought bitterly to preserve unilateral employer control of the workplace. And, as anyone knows who engages in union organizing, participates in collective bargaining, or observes American in-

dustrial relations, employer hostility to employee free choice and to free collective bargaining is growing rapidly, not declining.

Against that background, what we have been seeing over the past several years is a quantum increase in the number of employers who view collective bargaining negotiations not as the good faith renegotiation of wages and working conditions, but as an opportunity to override their employees' free choice of a union representative by recruiting a new work force of "permanent replacements," who are unlikely to desire union representation and who are far more likely to defer to unilateral employer control. This has been the clear pattern at International Paper, Eastern Air Lines, Greyhound, the New York Daily News, Diamond Walnut, and many other firms. And, as these examples illustrate, this development has caused incalculable and unnecessary suffering to workers, their families and their communities.

The *Mackay* doctrine is central to this employer perversion of collective bargaining. *Mackay* allows employers to convert a dispute over what the terms of a particular collective bargaining agreement will be into a dispute over whether the firm will continue to have any relationship at all with the union, with the collective bargaining system, and, indeed, with its long-time work force.

2. Stripped of the legalistic niceties, the doctrine is a grant to employers of the "right" to punish employees for doing no more than unionizing and engaging in collective bargaining. *Mackay* takes back a large part of the Federal labor law's broad promise to employees that they are protected against employer retaliation if the employees choose to exercise their freedom to associate in unions. And it does so when that promise would have the most meaning: during a collective bargaining dispute. At that critical time, the *Mackay* doctrine sacrifices basic workers' rights in the interest of aggrandizing employer prerogatives.

a. Section 7 of the Act—which its author, Senator Wagner, described as an "omnibus guaranty of freedom" for American workers, (Legislative History of the National Labor Relations Act of 1935, Vol. 1, page 1414 (1949))—states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . (29 U.S.C. §157.)

Section 8 of the Act, in turn, provides explicit assurances that workers who engage in the concerted activities protected by §7 will not be subject to employer reprisal. In particular, §8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]." 29 U.S.C. §158(a) (1). And, §8(a)(3) more specifically prohibits employers, "by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. §158(a)(3).

Moreover, Congress' intent that the right to engage in a lawful economic strike is to be protected is not left to the generalizations of §§7 and 8; those protections are reinforced in §§2(3) & 13 of the Act. Section 2(3) states that employees do not lose their status as employees when their "work has ceased as a consequence of, or in connection with, any current labor dispute." 29 U.S.C. §152(3). And §13 declares that "[n]othing in [the NLRA] . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . ." 29 U.S.C. §163.

As the foregoing shows, it has been understood from the first that the right to strike is integral to the operation of the NLRA system and that an employee may not be discharged for engaging in a lawful strike. See e.g., *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Indeed, the square holding of the *Mackay* case was that §8(a)(3) prohibits an employer from discharging or otherwise discriminating against strike leaders. See *Labor Board* v. *Mackay Co.*, supra, 304 U.S. at 345, 346. The *Mackay* opinion then asserted, however, although the issue was not before the Court, that the "permanent replacement" of a striker is fundamentally different from the discharge of a striker, and that an employer's action in "permanently replacing strikers" would be entirely permissible.

b. The notion that the law should recognize a fundamental difference between an employer's decision to discharge a striker and an employer's decision to "permanently replace" a striker ignores practical reality: in both instances the employee suffers loss of his job because he dared to exercise his statutory right to strike.

Not surprisingly, the *Mackay* doctrine is widely regarded as one that exalts form over substance and reflects the Judiciary's historic hostility to worker rights. Indeed, *Mackay* is, in all probability, the most criticized decision in our labor law.

Professor Paul Weiler of the Harvard Law School has put the point this way:

> [T]he NLRA's unmistakable intent is that an employer may not discharge an employee in reprisal for going on strike. But *Mackay Radio* and its progeny

allow the permanent replacement of the striker. Although the law distinguishes the two actions based on the subjective intent of the employer, the employee may be excused for not perceiving a practical difference as far as his rights under section 7 are concerned. The bleak prospect of permanently losing his job is obviously likely to chill an employee's willingness to exercise his statutory right to engage in "concerted activities". *[Weiler, Striking a New Balance: Freedom of Contract and the Prospects For Union Representation,* 98 Harv. L. Rev. 351, 389–390 (1984) (emphasis in original).]

Professor George Schatzki of the University of Connecticut adds that, even if the situation is looked at from the employer's perspective, the distinction between discharge and "permanent replacement" is meaningless:

The distinction between permanent replacement and discharge . . . can hardly mean anything to the displaced employee; and to the employer it can mean little more, since he is most unlikely to terminate strikers unless he is relatively confident that he can either find new employees to do the work or rehire the strikers after having bullied them by a false "termination". If the employer were intent on ridding himself of the strikers, to be safe he would be apt to wait until he has found replacements, even if he were given the option of "discharging" the strikers. As a practical matter, in almost all cases the *Mackay* doctrine—despite its articulated distinction—is an invitation to the employer, if he is able, to rid himself of union adherents and the union. [Schatzki, *Some Observations and Suggestions Concerning A Misnomer—"Protected" Concerted Activities,* 47 Texas L. Rev. 378, 383 (1969).]

Not even law students, the society's apprentice sophists, can see the distinction that *Mackay* places at the center of our labor law. William B. Gould, Stanford Law School's Charles A. Beardsley Professor of Law, has related:

Every year when I teach my students about the rules relating to the strike weapon in Labor Law I, I always explain the practical significance of engaging in protected activity. I point out to them that the practical significance is that the employee is immunized from employer self help instituted against [workers] in the form of discipline or discharge for engaging in the conduct in question. But then I tell them that despite the fact that workers cannot be discharged or disciplined for engaging in a strike, they can be permanently replaced. Either this produces nervous laughter or expression of puzzlement—and well it should! [W.B. Gould, *The Permanent Replacement of Strikers,* A Speech for the United States Department of Labor Symposium On Vital Issues and New Directions in Labor Management Relations (March 17, 1988), at 8–9.]

But, the clearest proof that it is spurious to distinguish between discharge and "permanent replacement" is the propaganda use to which anti-union employers put the *Mackay* decision. Our experience is that anti-union employers in NLRB election campaigns virtually always commonly cite the *Mackay* doctrine to their employees, and they do so to convey a threat: that unionization will lead to employer-imposed job loss. In congressional testimony 3 years ago, Professor Julius Getman of the University of Texas reported that in his study of 35 NLRB election campaigns virtually all of the employers threatened to use permanent replacements during a strike. And Professor Getman found that the "obvious intent" of these employers (confirmed in interviews with company officials) was "to convey the message that if employees choose to unionize, they would thereby endanger their jobs." Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, *Preventing Replacement of Economic Strikers,* 101st Cong., 2d Sess. (June 6, 1990) at 112–113.

c. Given the magnitude of the harm the *Mackay* doctrine causes to employee rights, it is very much to the point that *Mackay* is not firmly grounded in the NLRA's text. Rather, as Professor Weiler has noted, the *Mackay* rule "was laid down [by the U.S. Supreme Court] in an almost offhand fashion," as pure dictum, with no citation to any authority whatsoever. Weiler, supra, 98 Harv. L. Rev. at 388.

As I noted earlier, the *Mackay* case involved an employer who discriminatorily refused reinstatement to union leaders at the end of a strike. The National Labor Relations Board, in its *Mackay* decision, expressly recognized that the case did not present the more general issue of whether an employer could validly hire "permanent replacements;" accordingly, the Board refused to reach that issue. 1 NLRB 201, 216 (1936). The United States Court of Appeals for the Ninth Circuit in its turn—and although the appeals court dealt with the case twice—did not even discuss the issue. See 92 F.2d 761 (9th Cir. 1937); 87 F.2d 611 (9th Cir. 1937).

Nonetheless, the U.S. Supreme Court used the occasion of *Mackay* to assert, as dictum, that the "permanent replacement" of strikers is entirely lawful. 304 U.S. at

345–346, 347. And, the Court has reaffirmed *Mackay* in subsequent cases on stare decisis grounds, without ever going back to examine the validity of its original decision in terms of the relevant statutory text, statutory structure, or legislative history. See, e.g., *TWA Inc.* v. *Flight Attendants*, supra, 489 U.S. at 433–434; *Belknap* v. *Hale*, supra, 463 U.S. at 504 n.8.

d. Given this, it is not surprising that the *Mackay* doctrine has always been at odds with the rest of the labor law regarding strikers' rights. The Court's insistence that the Act does not restrict the employer's power to "permanently replace" strikers is an anomaly, given that the NLRA clearly does, as a general matter, restrict such employer powers.

For example, the Court has held that employers are prohibited from offering replacement workers poststrike super-seniority or added vacation pay, because such offers would be too destructive of the right to strike. See, e.g., *NLRB* v. *Erie Resistor*, 373 U.S. 222 (1963); *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967). Yet the Court continues to hold that employers may offer replacement workers permanent occupation of the strikers' jobs, even though this is clearly the offer that is most destructive of the strikers' rights. As a recent labor law treatise has commented, "It is as though the law permits killing but not wounding." J. Getman & B. Pogrebin, *Labor Relations: The Basic Processes. Law and Practice*, 141 (1988).

3. The gross injustice of the *Mackay* rule is made even more obvious when one recognizes the limited nature of the economic strike and the wholly disproportionate nature of the power that grants to the employer.

a. In an economic strike, employees engage in a temporary work cessation in order to influence the poststrike conditions under which the employees will resume work for the same employer. This is recognized in the NLRA's definition of "employee," which specifies that those engaged in a strike are not to be considered as having permanently abandoning their work, but continue their status as "employees of the employer." See NLRA §2(3), 29 U.S.C. §152(3).

Thus, an economic strike has limited objectives and—given the employees' interest in resuming work for a firm with a healthy long-term future—an economic strike seeks to cause no long-term harm to the employer. Employees know that if they cause their employer long-term harm, they cause themselves long-term harm.

Given this, *Mackay's* recognition of an employer's right to respond to a strike by "permanently replacing" the striking employees is inherently inequitable. On the one hand, employees on strike are pursuing a limited dispute over current terms and conditions of employment, without renouncing their continued relationship to the employer, and without seeking to do any economic injury to the employer that extends beyond the length of the strike.

In contrast, the employer exercising his *Mackay* "right" is renouncing any continuing relationship with his regular employees, is stating unequivocally that he will not alter his resolve to sever the relationship after the strike, and thus is seeking to impose long-term—indeed permanent—economic injury on the employees.

b. The *Mackay* doctrine is inequitable in an additional way. *Mackay* grants to employers what is by any standard the most lethal of economic weapons to use against strikers. In contrast, the labor laws—as amended since *Mackay* (in the 1947 Taft-Hartley amendments and the 1959 Landrum-Griffin amendments) and as more recently interpreted by the courts—severely circumscribe the ability of strikers to protect themselves from an employer who uses this weapon.

Thus, for example, the NLRA's secondary boycott provisions prohibit unions from responding to the hiring of "permanent replacements" by seeking support from those employees who work for the suppliers or customers of the employer. 29 U.S.C. §§8(b)(4) & (e).

Similarly, the NLRA's restrictions on union security arrangements prevent workers from seeking to ensure that their bargaining unit is made up of employees who are likely to respect strike solidarity in the face of a permanent replacement threat. 29 U.S.C. §§158(a)(3) & (b)(2). Indeed, under a 1985 U.S. Supreme Court ruling, the NLRA is now construed to prohibit union members from enforcing internal union rules under which members have promised each other that they will maintain solidarity during a strike, even if the employer takes steps to replace them. See *Pattern Makers League* v. *NLRB*, 473 U.S. 95 (1985).

c. Despite these changes, there are those who defend as an integral part of an unchanging collective bargaining system that was "delicately balanced" for more than 50 years, and that cannot be changed without unfairly tilting the balance against employers. That defense of *Mackay* is a fantasy from beginning to end. At the time of the 1938 *Mackay* decision, the "permanent replacement right" existed within a legal framework in which workers could effectively defend themselves by using powerful counter-weapons of their own. Most of these counter-weapons, as we just noted, have now been taken away by two major legislative revisions—Taft-Hart-

ley in 1947 and Landrum-Griffin in 1959—as well as by substantial reinterpretation of the 1935 Wagner Act. All of these legal changes have enhanced employer power and disabled union power. The current situation is thus far different from that which prevailed at the time *Mackay* was decided. Now the employer not only has the abstract legal "right" to permanently replace, he has the right to do so with impunity, protected by law from the traditional forms of union protective responses.

4. The evil of the *Mackay* doctrine goes beyond its fundamental injustice to employees, as great as that injustice is. *Mackay* also serves to corrupt the collective bargaining process itself, and thus injures the society at large.

a. By promising permanent jobs to replacement workers, an employer not only creates widespread fear in his work force, he also seriously damages the prospects for eventual compromise and settlement of the underlying labor dispute. The employer has not simply acted to prevail in a particular contract negotiation, but to displace the unionized work force, eliminate the employees' union, and to reestablish unilateral employer control of the workplace. The availability of this employer strategy fundamentally alters our collective bargaining system's ability to bring about acceptable compromise solutions to disagreements on wages and working conditions.

Our system of collective bargaining is more or less apt to succeed depending on whether both parties have an interest in reaching a mutually agreeable understanding. If one party comes to the table with a desire not to agree but rather a desire to force a confrontation in the hope of destroying the other, the prospects for a peaceful, honorable, and mutually beneficial settlement are close to zero. The *Mackay* doctrine sets up just such a life or death confrontation in place of the limited confrontation that the law contemplates.

I know of no more perceptive statement of the NLRA's theory of collective bargaining than Justice Brennan's often-cited summary in *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 488–89 (1960):

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is [therefore] part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. One writer recognizes this by describing economic force as "a prime motive power for agreements in free collective bargaining." Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with degree of economic power the parties possess. [Quoting G. W. Taylor, Government Regulation of Industrial Relations, p.18.]

Thus, the Act rests on the premise that the right to strike is essential to free collective bargaining and to a free economy. While I am far from admiring all he said and did, Senator Taft could not have been more right when he stated that "a free economy . . . means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions.' 1993 Cong. Rec. 3835–3836 (1947).

It is as true today as it was in 1935—to use the words of NLRA §1—that "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . ." 29 U.S.C. §151. And, it is as true today as it was a half century ago that only when employers are denied the right to punish employees for exercising the right to strike, and are denied the ability to rid themselves of collective bargaining by the use of economic power, will that inequality of bargaining power be rectified.

A collective bargaining system based on a right to strike will only tend to produce peaceful and equitable results if both parties have enough to fear from the other to wish to avoid a test of strength and to compromise their differences through the exercise of reason and moderation. Where there is no balance of power, there will either be no peace or there will be no equity.

b. In today's circumstances, it is not only industrial peace and employer-employee equity that is at stake, this Nation's ability to succeed in the global economy rests primarily on a commitment to developing a highly motivated, highly skilled work force, and to creating stable employer-employee relationships based on mutual re-

spect and a mutual commitment to their joint enterprise. Nothing less is sufficient to ensure employers and consumers high productivity and high quality, and to ensure workers high wages and working conditions.

The *Mackay* rule takes us in precisely the opposite direction: toward transient, unequal employer-employee relationships that can never capture the best that working people have to offer.

5. Just as it would be a mistake to deny the effect of S. 55 on the comparative position of employers and organized workers in collective bargaining it would be a mistake to overstate that effect. Whatever my preferences may be—and despite the assertions of various employer groups—S. 55 does not come close to creating an imbalance in favor of working people. The reason for this is simple: all of the evidence demonstrates that employers have always had effective options in response to a strike other than the hiring of permanent replacements.

In many negotiations, of course, employers choose to ride out a strike without attempting to operate. The employer does so because the striking employees—who are not earning their normal wages—are under comparable pressure to avoid a long strike and reach a fair settlement.

In other instances, the employer does choose to operate. As one seasoned observer has pointed out, such an employer has many options other than the hiring of outside replacements:

> [The employer] may be able to carry on with less than his full labor force by using nonstriking members of the bargaining unit, returning strikers, and managerial, supervisory, or other nonunion personnel. He may likewise be able to continue without production workers if he prepares for the strike by stockpiling in advance, or he may engage in "shifting"—transferring work from a struck to a nonstruck factory for the duration of a strike. Finally, the employer may subcontract work normally done by the striking employees. [Gillespie, *The Mackay Doctrine and the Myth of Business Necessity,* 50 Texas L. Rev. 782, 790 (1972).]

Until recently, these options have been the ways in which most employers have responded to strikes. A 1982 Wharton Business School study revealed that most employers found no need to hire any replacements during strikes. Indeed, many chose not to hire replacements because they believed that doing so would make a settlement and a resumption of stable labor relations less likely.

See C.P. Perry, A.M. Kramer and T.J. Schneider, *Operating During Strikes,* 63–66 (1982).

Even where the employer chooses to use outside replacements, all the evidence shows, in Professor Weiler's words, that "[m]any, or even most, employers can quite comfortably make do with temporary replacements." Weiler, supra, 98 Harv. L. Rev. at 391. Professor Weiler bases this conclusion, in part, on the experience of the many employers who have hired temporaries during lockouts and unfair labor practice strikes, where use of permanent replacements is unlawful, as well as on the experiences of employers who choose to use temporary replacements rather than permanent replacements. See id. at n. 132.

Two other sources provide further confirmation.

First, in most Canadian provinces the use of permanent replacements is unlawful, and employers often use temporary replacements during economic strikes. See Hearing before the Subcommittee on Labor Management Relations of the House Committee on Education and Labor, *H.R. 4552 and the Issue of Strike Replacements,* 100th Cong., 2d Sess. (July 14, 1988), at 47, 67 (testimony of Canadian labor law scholar that employers in Canada have generally been able to recruit temporary replacements). Indeed, many of the same employers who argue here that the prohibition of a permanent replacement strategy would be intolerable not only tolerate such a prohibition but have prospered under it in many provinces of Canada.

Second, many employers who use a permanent replacement strategy, in order to maximize their authority over both strikers and strike replacements, have presented each prospective "permanent replacements" with a prepared statement to the effect that the replacement has no legally enforceable job rights in his/her new job should the employer choose to reach a settlement with the strikers, and these employers have required each replacement worker to sign the statement prior to being hired. See hearing before the Employment and Housing Subcommittee of the House Committee on Government Operations, *Collective Bargaining and the Hiring of Permanent Strike Replacements,* 102d Cong. 2d Sess. (September 18, 1992) at 72–75. According to the U.S. Supreme Court, this arrangement—despite the complete absence of any guarantee of permanence to the replacements—is still sufficient to render the strikers permanently replaced, so that they have no right to return to their jobs at the strike's close unless their employer chooses to reinstate them. See *Belknap* v. *Hale,* supra, 463 U.S. at 503. But the very fact that employers have chosen this ar-

rangement demonstrates that they can successfully recruit replacements for the term of a strike without a grant of permanent status.

The sum of the matter is that the strike is the last resort of employees who seek to convince their employer of the relative merit of their position. When employees exercise that right, they have already come to terms with the fact that during even a successful strike—one that puts effective economic pressure on the employer—the employees suffer serious economic losses as well, and with the further fact that if they seek more than their employer can afford, it is their jobs as well as his business that will be put in jeopardy.

The structural constraints on the right to strike exert their own effective discipline. There is no warrant for—and there is no justice in—permitting employers to further their short-term interest in "winning" a strike by imposing long-term punishment on the exercise of this most basic of employee rights.

It is equally to the point that an employer who hires permanent replacements—and who thereby discharges a senior, experienced and trained work force—is not seeking to prevail in a collective bargaining dispute, he is seeking to rid himself of his unionized work force in order to reestablish his unilateral control over the workplace.

This is a tactic that only an employer who refuses to recognize his employees' contributions to the enterprise, and who sees stable and good faith collective bargaining as an evil, finds attractive. It is no credit to today's corporate culture that such employers have come increasingly to the fore. This kind of overreaching for a short-term gain not only threatens the collective bargaining system, it threatens the long-term vitality of America's economy which depends on true labor-management cooperation based on the mutual respect that comes only from a relationship between equals.

The great social contribution of the labor laws has been to prevent misuses of management's common law rights to enhance management's own prerogatives at society's expense. S. 55 makes just such a contribution and should be enacted into law.

Senator METZENBAUM. Thank you very much, and we're very glad to have Mr. McGlotten and Mr. Gold with you this morning.

We'll have 5-minute rounds for questions. I know it's short, but as I figure the time, it will be impossible to get all the witnesses on and permit everybody to question them if we don't limit it to 5-minute rounds.

Opponents of this legislation wonder why we have devoted so much time and energy to this bill. Given that the American labor movement represents only one out of six workers in this country, can you explain how a healthy labor movement helps all workers, not just your members? In other words, does this have an impact upon all working people, or just those who are unionized?

Mr. DONAHUE. Interestingly, Senator, I thought that Secretary Reich provided more eloquent testimony on that point than I could. He said that it is a practice which creates a climate of distrust which affects all workers in the Nation and tends to create an unease in the basic relationships of organized and unorganized workers with their employers.

I think he is right about that. I think that it goes quite beyond the instance of a strike in which workers are permanently displaced; it goes quite beyond the bargaining units involved in collective bargaining. So I think it has a bad effect on all workers in the United States. It goes to the heart of the collective bargaining system, and it guts the collective bargaining system, and I would submit that it is the collective bargaining system which has driven the wages and conditions of the vast majority of workers in this country.

Senator METZENBAUM. The bill's opponents say that passing this law will eliminate a union's risk in striking, that thereafter they can strike and not be worried about anything. Can you tell us what

the situation was prior to 1980 and what your overview is on this subject?

Mr. DONAHUE. Senator, I have been part of a lot of discussions with negotiating committees and with employees who face the decision as to whether or not they should strike and face how they should vote in deciding that issue. I don't know anybody—I have never known a worker—I don't know a person, a professional or a person who depends on his weekly income to survive, who lightly dismisses the prospect of giving up even a day's pay or a week's pay. So this fantasy is created that workers lightly and blithely choose to strike, not knowing what is ahead for them, not knowing how long that strike is going to last, not knowing how much their families are going to be deprived. That's simply a fantasy that exists in the minds of people who would oppose this bill or would oppose collective bargaining. It has nothing to do with the real world.

Senator METZENBAUM. Can you tell us what impact the utilization of striker replacements and the threat of striker replacements—which has become more prevalent in the last 12 or 13 years—have had on collective bargaining negotiations? I think the latter, the threat, is a far greater problem than the actual use. Obviously, the instances of the threat are much, much greater.

Mr. DONAHUE. The effect is precisely this. There is that moment in a collective bargaining negotiation when the employer looks across the table, looks at the union representative and says, "You can strike; of course, you can strike—but if you do, you will be permanently replaced." And you are now looking at a very frightened group of employees who are about to be cowed into accepting any sort of agreement or take the greater risk of being permanently replaced from day one of their strike, or day two, or day three, or whenever the employer chooses to exercise that.

It is the threat of permanent replacement which has the chilling effect on collective bargaining, and that is what the employer community is concerned about. They like that chilling effect, Mr. Chairman.

Senator METZENBAUM. Are you aware of the fact that there are certain law firms as well as private employer consultants who actually specialize in bringing in striker replacements? I conducted some hearings several years ago in connection with the New York Daily News strike, and I was just shocked to hear that they had gone to Tennessee long in advance of any strike—in fact, there was no strike at that time—in order to plan to bring in striker replacements. And I remember the union saying, "We really didn't go on strike. We suddenly found we were on strike." And I remember one man testifying who said, "I went out the door to get some fresh air, and suddenly I was told I couldn't get back in, that I was on strike, by the management, not by the union."

What can you tell us about the use of professional striker replacement firms?

Mr. DONAHUE. It is a growing industry, Mr. Chairman, and the Daily News strike is probably the best documented case of it. My recollection is that in the Daily News, there was testimony before this committee that the Daily News had spent some $26 million preparing for that strike, had set up a mock newsroom in New Jer-

sey, had brought in security guards and other workers from Tennessee, had them housed in hotels over in New Jersey.

I can't find it now, but I would be happy to submit it to you, Mr. Chairman—I do have an advertisement for the kinds of seminars that are conducted on this manner, and an advertisement from a security company which describes in detail the size buses that they use to take scabs through picket lines because there is safety in numbers, and this bus carries 60 people, and that's the way you should take the quote "permanent replacements" through a picket line.

It is a growth industry, Mr. Chairman, and it is an industry which is destroying collective bargaining. And we still believe this Nation is dedicated to the theories and practice of collective bargaining.

Senator METZENBAUM. The committee would be interested in those advertisements, if you have them. If they are short and you want to submit them subsequent to the hearing, we'd certainly be glad to include them in the record.

Mr. DONAHUE. Thank you.

Senator METZENBAUM. Senator Kassebaum.

Senator KASSEBAUM. Thank you, Mr. Chairman.

Mr. Donahue, as you said, the Secretary spoke eloquently about the climate of distrust, and I guess I would like to answer my friend, the Senator from Iowa, by just saying that he, too, spoke eloquently to understanding what takes place. But I would just make the case that in the eighties, I think there were decisions made in the corporate world because of hostile takeovers and mergers that significantly disrupted the ability to build trust between employers and employees. And out of that, we are still today trying to put together an environment where you can have productive collective bargaining efforts, where you can feel secure in your job, because obviously one of the big worries today is health care benefits and other aspects of the labor market that are out there, regardless of whether you have a permanent replacement issue.

I would just ask—and you have answered it in many ways by saying it is the climate of distrust that occurs—but I was going to ask whether you really believe that there has been prevalent practice of permanent replacement of workers. The numbers are not great; is that accurate?

Mr. DONAHUE. That is true. And Senator, I was reviewing what we said here 2 years ago, and I noted then that there were not many Scud missiles fired into Israel in the Middle East conflagration, but one or two sure made a dent in the attitudes of the Israelis as to what might happen to them. And that is precisely the comparison I would offer you on the use of striker replacements.

If you told me that it happened only ten times, I would tell you it was used 10,000 times at the bargaining table to intimidate people and to destroy a cooperative, hopefully cooperative, bargaining process.

Senator KASSEBAUM. Well, I would just say, though, that what might have been a poor practice in one or several instances, I don't think should determine a policy which overall, in the times we are in now could, as I say, be very disruptive. And when you talk about the threat that exists on the part of the employer with permanent

replacements, there is also the threat by the employees to strike. So you've got threats on both sides that have been used in the course of the process.

And I would like to ask you—of course, employees have to vote to strike—would you support a secret ballot for employees on whether they wish to strike or not?

Mr. DONAHUE. I would not support a provision in law for a secret ballot for a strike vote. Neither do I believe that a union representative would survive long if he didn't conduct such votes. People don't take workers out on strike against their will. It is not possible to do that. People judge what are the circumstances now. I come from a union, Senator, that in the years in which I worked in the local union in New York City, had some 18,000 people covered under one master agreement, and they would vote to strike or not strike, and in later years they would vote to authorize their negotiating committee to make that decision. The negotiating committee was a committee of about 35 or 40 people who had been elected to carry out the negotiations. And they would give that right to the negotiating committee. I think that's a perfectly valid, democratic practice. So I would not think that you ought to think about legislating a requirement of a ballot in every case.

Senator KASSEBAUM. Is that done in most cases, a ballot?

Mr. DONAHUE. Yes, indeed.

Senator KASSEBAUM. Was that done in the Caterpillar strike? I don't know. I am just curious.

Mr. DONAHUE. I would have to assume it was.

Senator KASSEBAUM. A secret ballot.

Mr. DONAHUE. I would certainly assume so, yes. Yes, I'm sure it was, Senator.

Senator KASSEBAUM. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Kassebaum.

Senator Kennedy.

Senator KENNEDY. Mr. Donahue, how do you react or respond to those who say if we pass this bill, we aren't going to continue to have a level playing field, or that we will be disturbing the delicate balance which has existed over a long period of time, that this bill will somehow give undue advantage to, in this case, the workers over the employers? We hear that bantered around a good deal, and I am interested in your reaction.

Mr. DONAHUE. On the delicate balance question, Senator, I think that there is no such delicate balance currently. There perhaps was intended a balance when the National Labor Relations Act was passed in 1935. That balance was changed considerably by the 1947 amendments, by the 1959 amendments; it has been changed continuously by court decisions.

The reality is that when this decision was issued by the Court in 1938, workers had abilities to respond to a threat of permanent replacement. They had secondary boycott activities available to them. They had a discipline over membership. They had the ability to ensure that there was a greater solidarity among their fellows. All of that has been changed.

On the level playing field issue, that's a phrase that I reject whenever I can, unless people see this as a game. I see it as a de-

fense of workers' rights and the process of collective bargaining as a way of determining the future conditions under which workers and managers are going to conduct their relationship. It is not a game, and if we continue to think of it in that way in this country, then nobody should delude themselves about cooperation and worker involvement and those other current ideas, because you can't say that this is a playing field on which two people oppose one another; they have to recognize from the outset of the negotiations their mutual interest. Otherwise, they will never come to a good agreement.

Senator KENNEDY. I understand, looking at the strikes among the Steelworkers over a recent 10-year period, that the average length of economic strikes where permanent replacement were used was 9.6 months, the average length of economic strikes where temporary replacements were used was 4 months. So where you had permanent replacements, 9.6 months; temporary replacements, 4 months. Is that something that you find pretty common in terms of the other strikes as well, that there is a harsher economic impact when permanent replacements are used? I imagine there is, obviously a harsher impact not only on the workers, but is it harsher to the community and to the economy as well?

Mr. DONAHUE. When a strike occurs, everybody hopes it will end very quickly. The point at which the employer announces that, "If you don't come back to work on Monday, you are going to be permanently replaced," in his words, "and I will hire permanent replacements, and you will lose your rights in the job," is a point at which that strike goes over the dam, and it becomes enormously more difficult to settle such a strike.

Once that permanent replacement issue is in the situation, the very first issue at the table has to be, well, will you get rid of the permanent replacements or not? Strikers will not say, "Let's have a new contract. I don't care if I go back to work. It's okay. Let the permanent replacements enjoy the new contract." That's not why they're striking.

So it enormously complicates the collective bargaining.

The study which Secretary Reich referred to by Professor Gramm comes to almost exactly the same findings as those you cite. Gramm says that strikes where permanent replacements were used lasted a mean duration of 363 days. The mean was reduced to 72 days when the employers used temporary replacements, and only 64 days when no replacements were hired. I think that evidence is consistent with what you cite, Senator.

Senator KENNEDY. As I understand also, in 1990, of the 26,450 striking workers who were permanently replaced, approximately 69 percent, or 18,300, were engaged in strikes in which health care benefits were a major issue. Of the strikes in which health care benefits were a major issue, 90 percent involved proposals by employers to increase employees' out-of-pocket health care costs; 5 percent involved employer attempts to decrease health care benefits levels; 5 percent promoted employer attempts to eliminate all health care benefits.

I think all of us who have looked at this issue find that the principal reason over the period of recent years that these strikes have taken place is that workers are just trying to hold on to hard-won benefits, particularly in the health care area. These workers are in-

dividuals who are looking out after the health care needs of their families, their children and their wives. This is the principal element on which these strikes have taken place. Let's put this in some context. And what the employer is effectively saying is that if you go out on strike and try to protect your family in terms of health care, you are going to get replaced. This is what is really happening. And again, it is an example of the power in many instances of the health care industry working in these instances through the employers to squeeze down decent health care for working families.

I see my time is up, but just very briefly, on the health care issue, have you found that to be the case, from your own experience and the experience of the trade union movement?

Mr. DONAHUE. I find generally, Senator, people tell me that in their collective bargaining over the last several years, the ability to gain wage increases has almost disappeared because of the dominance of this cost of health care at the bargaining table. And it is the issue which causes the most strikes. We have done that study.

Senator KENNEDY. And of course, the point is if they are covered, and so many of the other companies are not covered, the workers are actually paying for the other workers who, in many instances, they are competing with for health care costs.

Mr. DONAHUE. Yes, exactly.

Senator KENNEDY. So they are losing their jobs because they are trying to cover their own families, sacrificing any wage increase, and are then being thrown out of work protecting their families' health benefits. We talk about justice and fairness on these issues, and that's something that I think has to be considered.

I thank the chair.

Senator METZENBAUM. Thank you, Senator Kennedy.

Senator Jeffords.

Senator JEFFORDS. Mr. Chairman, as often, I find myself in agreement with the chairman of our full committee on the question of health care. I would like to point out that I think a serious problem exists in this country with respect to workers, especially older workers, with respect to health care.

We had very difficult testimony and a sense of sadness with respect to retiree workers from the UAW and the Steelworkers here who testified to the terrible problems created by forcing older workers out of jobs because it reduces the companies' health care costs. We are involved now in designing, hopefully this year, universal health care coverage.

So I would suggest that perhaps, that being the major reason for strikes of recent times, we ought to wait before taking up S. 55 until we have the health care plan of the President looked at. And I know I have my own plan, which I have talked to the unions about, which would basically remove these problems of health care and therefore the need for strikes.

So wouldn't it be reasonable to wait until the Reich commission has started on these problems, and shouldn't we wait until the health care problem is taken care of before we take up S. 55?

Mr. DONAHUE. Senator, I am smiling, and I mean no disrespect, but by that measure one also has to note there are a fair number of strikes that are caused by the general economic downturn in the

Nation, and we should therefore, I would submit, by that same logic, postpone consideration of this legislation until the economy is thriving.

I suspect you could cite five or six other things that are wrong in the Nation's life and that the Congress hopes to address, and we could wait for each of them to have its impact. But meantime, the collective bargaining process is being destroyed by the employer use of this weapon. Meantime, workers are being permanently replaced and losing their jobs because they go on strike. Meantime, the law, which says you have a perfect right to strike doesn't mean a thing, because you don't have a right to strike if I can replace you from day one and if I can advertise for a permanent replacement before you even go out on strike and to see if that will terrorize you into accepting my conditions—and if you don't, you can go out on strike, and I will replace you from day one. There is no right to strike. I just can't accept the idea that we have an unfettered right to strike, which is at the core of the collective bargaining system; it is what brings reality to conversation. And I can't accept the view that we have that right to strike while the employer can fire me. And whether you tell me I have a right to be rehired 10 years down the road, I am still fired.

Senator JEFFORDS. We had extensive dialogue last year—I am not going to repeat it, and I would ask the chairman to take legislative notice of our dialogue at that time—but I would suggest also that the Daily News case is probably the one, if maybe the only example, where you could really justify replacement workers. I think it is a bad one to use as an example that the system is working poorly. In that case, you had a company in distress, you had a work force which was strident, which was about double what it needed to be; you had workers who were being paid and were not working; you had cases of discrimination within the union. It is probably the one example that I could not possibly defend where using replacement workers was uncalled for. But maybe you could comment on that. So I would just advise you, I wouldn't use that—and the chairman is not here—as your example of why there should be no replacement workers.

Mr. DONAHUE. I would obviously have the opposite, 180 degrees around, view of the Daily News strike. The Daily News strike is brought on by an employer who calculatedly prepares for a strike, who spends I would say $26 million putting all these arrangements in place, who advertises for replacement workers while the negotiations are going on. He confronts the unions, which are offering concessions in their bargaining, and he says that is not enough. Well, maybe it wasn't enough, but that's for them to work out and decide.

The Daily News is a newspaper that existed in an industry beset by technological change, trying to deal with the problems of a shrinking opportunity for work in a larger work force, and trying to deal realistically and decently with what do you do with employees who today you may judge to be surplus. Do you just throw them out on the street for economic efficiency, or do you, as a result of something that you and I agreed to 3 years ago, allow them to continue to work and provide some cushion for their later displacement?

That's what the Daily News did. None of the conditions which existed at the Daily News so far as I know were written down on a piece of paper by the union and handed to the Daily News. Every one of them was a negotiated contract to which the employer agreed.

Now, I accept whatever I see in a collective bargaining agreement as being the agreement of the employer and the union, and they live by the consequences of it.

Senator METZENBAUM. Thank you very much.

Senator Harkin.

Senator HARKIN. Thank you very much.

Mr. Donahue, Secretary Reich testified in his testimony that some companies advertise for permanent replacement workers before they begin negotiations, in other words, stockpiling them, just like raw materials—those were Mr. Reich's words—and again, sending a message to employees that they are disposable.

How often does this happen, where companies actually advertise before they actually get into the negotiation process for replacement workers?

Mr. DONAHUE. I don't have a statistic, Senator. I really don't know.

Senator HARKIN. But has it happened?

Mr. DONAHUE. Oh, it has happened, surely. There is lots of anecdotal information about it. I am looking at a fact sheet on Lourdes Hospital in Paducah, KY where it happened, where the hospital advertised for replacement workers before the strike occurred, before the contract expired, and in the face of the union's offer to extend the contract, the employer refused, forced the workers out on strike, then replaced them, and the strike has been lost; there is no question. I don't know the facts here. The union may still be picketing. But this strike began on December 1, 1991, and those who say this happened in the eighties but it isn't happening anymore—that's simply not true. It is happening. The advertisements are being placed.

And I would say to you, Senator, that even worse than the advertisement, which is the most blatant example of the intimidation, is the threat which is delivered across the table—and it is either expressed or implied—but that, "You know that you have a perfect right to strike. Of course you do. You go ahead, and I am going to fire you. Now, I am not going to call it that. I am going to permanently replace you."

Senator HARKIN. Obviously, it is against the law to discharge them, but it is not against the law to permanently replace them.

Mr. DONAHUE. That's right.

Senator HARKIN. I wish somebody would explain that to me in language that I could understand.

Mr. DONAHUE. You'll have to have another witness—maybe one of the later witnesses can.

Senator HARKIN. In your written testimony you outlined the Mackay case, I remember that from law school. The Mackay case really did not reach the issue of permanent replacements. The NLRB in its decision didn't reach it. The Court of Appeals didn't reach it, and the U.S. Supreme Court just sort of plucked it out of thin air as dictum, and the courts have lived with it ever since.

I have a feeling—and this is my own feeling—that in those intervening years from, let's say, 1940 to 1950, nothing much was done because we were more intent on winning the war, bringing our troops home, and rebuilding the peace after the war; and then, perhaps, in the heyday of the fifties, when we started our great economic resurgence in America, that employers weren't too intent on using this for fear that it actually might get to the U.S. Supreme Court, and that U.S. Supreme Court might throw it out, the so-called Warren Court, over all those years.

So it just wasn't pushed. But then it started to be pushed after that Court was replaced with today's Court. In fact, the story about my brother did not happen in the eighties. A lot of people think it happened under Reagan. No. It happened in the 1970's, again, when there was a Court that basically gave out the signals that they would certainly uphold the ruling in Mackay.

So I think that, more than anything else, that might be the reason why it was never pushed in those intervening years, and it was sort of, as they said, settled law. It really wasn't settled law at all, and I think that it is some kind of contorted logic to say that somehow the National Labor Relations Act says that an employer cannot discharge a person for exercising the right to strike and for striking, but they can be permanently replaced. I mean, that just makes absolutely no sense, but that is the State of the law today.

So I think what you said in your testimony on page 16 really sums it up. You say, "A collective bargaining system based on a right to strike will only tend to produce peaceful and equitable results if both parties have enough to fear from the other to wish to avoid a test of strength and to compromise their differences through the exercise of reason and moderation. Where there is no balance of power, there will either be no peace or there will be no equity."

I thought that to be a very moderate statement, one that says that you do have to compromise differences and that we do have to understand that we live in a world where you can't always have your way, and I can't always have mine. I would contrast that to the testimony that I guess we'll hear later—I was reading from Dr. Lesher's testimony representing the U.S. Chamber of Commerce, where he says that "Members of the U.S. Chamber are in total agreement that this bill is absolutely unacceptable and that there can be no compromise on this issue." And later on, he says, "The members of the Alliance share total agreement that this bill is absolutely unacceptable, and there can be no compromise on this issue."

He says it about three or four times in the testimony, and of course, he will testify here in person by just reading from his testimony. And I just thought that was an interesting kind of contrast between what I consider to be a reasoned, moderate approach that you were taking and the sort of attitude of the U.S. Chamber, or at least their representative, in his written testimony, that there can be absolutely no compromise on this.

Compromise is the essence of us getting along in a pluralistic society.

Thank you very much, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Harkin.

Thank you, Mr. Donahue, and thank you for bringing with you Mr. McGlotten and Mr. Gold. I might say to you parenthetically that as we meet here, there is a very distasteful strike that is occurring in Cincinnati, OH at a nursing home where a group of employees who were making about $5, $5.50 an hour, went on strike, and the agency saw fit to advertise for permanent striker replacements. They then changed their position in a letter, after some intercession by various and sundry people, and then after that, they reversed themselves again and said that the workers were being permanently replaced. It is a very hurtful situation, and I had hoped that the internationals would be helpful as much as possible. I think the firm of Taft, Stettinius and Hollister, one of their lawyers, has figured out this is a great game to be playing. I have seen some of the letters that they have written, and it is really revolting to me. I would hope that you could help those workers. I think they need the help of all of us.

Thank you very much.

Mr. DONAHUE. Thank you, Senator.

Senator METZENBAUM. Our next panel includes Cynthia Zavala, of Stockton, CA, a replaced employee at Diamond Walnut Growers, Inc.; the Reverend Bryan G. Fulwider, of Little Rock, AR, president of the Arkansas Interfaith Conference; and Juanita Landmesser, of Hope, AR, a replaced employee at Champion Parts Rebuilders.

We are happy to have each of you with us this morning. I think you know the rules. There is a 5-minute limit with respect to your testimony, with the understanding that your entire statement will be included in the record.

Ms. Zavala, would you please proceed?

STATEMENTS OF CYNTHIA ZAVALA, STOCKTON, CA, REPLACED EMPLOYEE, DIAMOND WALNUT GROWERS, INC.; REVEREND BRYAN G. FULWIDER, LITTLE ROCK, AR, PRESIDENT, ARKANSAS INTERFAITH CONFERENCE; AND JUANITA LANDMESSER, HOPE, AR, REPLACED EMPLOYEE, CHAMPION PARTS REBUILDERS

Ms. ZAVALA. Before I start, I would like to say that I am here not by myself; I am representing Diamond Walnut strikers, Stockton, CA.

My name is Cynthia Zavala. I live in Stockton, CA. I am 52 years old, and I have 4 children, 11 grandchildren, and one great-grandchild.

I have been employed at the Diamond Walnut processing plant for 24 years, starting in 1961, with several breaks when I had my children. During my years with the company, I have worked my way up to my present position as cannery supervisor. My husband, Cruz, also works for Diamond Walnut. He has been there for 33 years.

I have worked hard for our company. They called me "The Roadrunner," because I was always moving so fast. Everybody in our plant always worked hard. We felt a lot of pride in our work, and we took a personal interest in the products. That is why in 1985, when the managers came to us and said the company was in trouble, we agreed to cut our own pay to help save our company.

It was hard for us. People who had been with the company for 20, 30 years would have to go back to what they had earned maybe 10 years ago. Most of us only got between $5 and $10 an hour. We had responsibilities, and we had families to think about.

But we felt Diamond Walnut is our family. The managers said if we stuck by them, they would stick by us. Some of the people ended up taking pay cuts as high as 40 percent.

After those cuts, we still worked even harder to bring our production levels up. This allowed us to double our productivity and cut the work force in half, from 1,200 to 600, at the same time.

In 1990, I was picked to be employee of the year, along with another supervisor. But I didn't feel this award was for myself; it was for my whole department. We broke the production record on the bulk line that year.

Our hard work for Diamond Walnut made this plant. The next year, net sales reached an all-time high of $171 million, and the growers' return on their investment was 30 percent. Our contract was up for renegotiation, and we felt sure that the company would be ready to repay us for our sacrifices and hard work.

Instead, the company wanted to cut our pay even more. They offered us a small hourly increase of 10 cents, but they were going to turn right around and take twice that much away by making us pay $30 a month for our health coverage.

The managers—and I'd like to State that we have been there a lot longer—started coming to the production line, and they brought young men from the outside with them. They wanted to know how we did our work. Our union, Teamsters Local 601, complained. After that, they could still watch, but they weren't allowed to touch the machines.

It was so hard. We knew that they were getting ready to replace us. We would go home sometimes at the end of the day and cry because they were forcing us to train the people who were going to take away our jobs.

We tried to get the company to be fair. We knew that our lower-paid people were just getting by—they were down to $5 and $6 for full-time. Seasonal workers were getting only $4.25 an hour, with no health benefits. We knew we couldn't take another pay cut. But the company said take it or leave it.

We had never gone on strike before, and we had been in the union for almost 40 years. But we felt the company gave us no choice, so we went out. The next day, the company put the scabs to work on the line. The long-time, loyal Diamond Walnut strikers—my testimony says "workers," but I am saying "strikers"—75 percent of us are women and minorities—ended up on the picket line fighting for our own jobs and what is right.

That was September 4, 1991, 18½ months ago. Like Senator Harkin said, to be on strike is like a death that we have been mourning, that we can't get rid of. We are still trying to get our jobs back, but they told us we are not wanted, that their loyalty is to the replacement workers.

We still cannot believe this has happened to us. We thought we had the right to strike to defend ourselves against being exploited by the company.

As the months go by, many strikers are losing their homes, cars, and getting behind on their bills. Some of us cannot afford to pay the COBRA insurance, so we have to skip going to the doctor and pray that we won't get sick. It has been kind of hard because 2 weeks ago, one of our workers died without health insurance.

We try to cheer each other up, and we keep working toward the day when we will get our jobs back, and God will give us our jobs back. We hold prayer meetings on the picket line every Tuesday.

But while we are struggling to get our jobs back, the U.S. Agriculture Department has given Diamond millions of dollars in subsidies to help the company sell more of its products in Europe. Diamond now sells 40 percent of its walnuts in Europe. So my union sent me to six European countries to talk with the unions.

The people I talked to were shocked about what Diamond Walnut has done. When I told them that the United States Government has allowed the company to hire permanent replacements, they didn't believe it, and they made me repeat the story twice.

Our union has been working very hard to try to help us, but we need our government to help us, too. If the law says we have the right to strike without being punished, then how can Diamond Walnut get away with replacing us?

I have dedicated 24 years of my life to Diamond Walnut. We will work hard for the company when we get our jobs back. We believe in our country, and we believe in justice, and most of all we believe in God. And we believe that Congress and President Clinton will do the right thing this year.

Thank you, Mr. Chairman, for allowing me to speak today on behalf of Diamond Walnut strikers who are depending on the government for help. God bless you all.

Senator METZENBAUM. Thank you very much, Ms. Zavala, for a very strong and understandably impassioned speech. I gave you a little extra time. I didn't have the heart to cut you off in the middle of your speech. It is very telling, very moving, and I congratulate you for it.

Ms. ZAVALA. Thank you.

Senator METZENBAUM. Reverend Fulwider, we are happy to hear from you, sir.

Rev. FULWIDER. Thank you. Good morning, Mr. Chairman, members of the committee.

I want to thank you for the opportunity to speak with you this morning regarding workplace fairness legislation. My name is Reverend Bryan G. Fulwider. I am representing the National Religious Committee for Workplace Fairness, of which I am a member. I also chair the Arkansas Religious Committee for Workplace Fairness, which is a chapter of the National Committee, and I serve as president of the Arkansas Interfaith Conference, which represents 11 faith communities and over 450,000 persons of faith in the State of Arkansas.

Primarily, however, I am a pastor in a local congregation in Arkansas. There is a new and growing coalition between religion and labor in our Nation. It is new only in the sense that it represents the reawakening of an historical stance. People of faith have always had genuine concern for issues surrounding the dignity of all working people. People who labor with honesty and integrity in vo-

cations of every type deserve to be treated with respect and fairness.

In recent years, there has been a continuing erosion of the balance necessary for effective collective bargaining. It is this continuing erosion which makes this workplace fairness legislation so very necessary.

We have all heard of a place called Hope. Hope, AR, to be precise. In the recent election, the name of the town became a household word.

But you may not know about a place called Champion Parts Rebuilders in Hope. Champion Parts Rebuilders is a story about people. It is a story about people who have been destroyed by having their jobs taken from them in the midst of a legal strike—a strike not over higher wages, but rather one which began as negotiations broke down around the issue of lessened health care coverage. The workers simply could not afford higher health care deductibles.

The company was not in trouble financially, but they still wanted the workers to shoulder the burden of the company's reduced costs for health care coverage. The workers were asking only for continued reasonable coverage. They had even agreed to a 20 percent cut in coverage from the levels that they had been receiving.

But a company called Champion Parts Rebuilders, in a place called Hope, stubbornly refused to even discuss the issue further. Even after the contract expired on April 21, 1991, and the company substituted an inferior health insurance policy, the workers continued to work and negotiate until September 4, 1991, trying to resolve the impasse. But after the company gave the "take it or leave it" ultimatum, the workers took the only recourse they had and announced a legal strike.

They fully expected temporary replacement workers to be brought in. That, after all, is what is done in many cases. They never, however, expected to be permanently replaced by a company to which so many had given their heart and soul in their labors for so many years. But that is exactly what happened.

Following a corrupt and immoral lead from others dating back to the days of Ronald Reagan and the Air Traffic Controllers, Champion Parts Rebuilders in Hope, AR began to permanently replace their workers. There was no more collective bargaining, no more fair negotiation, no more justice, no more equanimity, no more Labor Relations Act of 1935, and finally, there were no more jobs for the workers of Champion Parts.

Minnie Muldrew was in her late forties. She worked in heavy-duty starters, a piece of equipment weighing 70 to 120 pounds. Minnie weighed about 130 pounds. It was after April, the health care benefits had already been cut back, and that's when it happened. Minnie felt very poorly on this particular day. She knew that she had used her seven sick days, and she would be fired if she took one more. So she toughed it out, went to work, and she worked on the heavy-duty starters all day. But the pneumonia that she had, however, which she didn't know she had, dragged her down, and when the 3:30 whistle blew at the end of the day, she moved slowly toward the time clock. She never made it; the heart attack stopped her before she got there. The new policy covered only $35,000 on major medical. She was stuck with nearly $50,000

in medical bills. She was making about $6 an hour as a single mother with a child in college before she was permanently replaced.

At another Arkansas company, Morrilton Plastics, workers were also permanently shut out of their jobs. Following a long series of negotiations, workers were permanently replaced. The company finally closed its doors rather than reconcile.

At Harvest Foods, one of Arkansas' largest grocer store chains, newspaper ads threatened the permanent replacement of workers. They effectively cut of negotiations, and workers went back to work in less than satisfactory conditions.

A continuing issue includes several hundred paper workers in Crossett, AR who were threatened with permanent replacement. Over 150 have been permanently replaced at Georgia Pacific.

Each week in my office, in a rather small parish, I meet with a number of people who are affected by current unfair labor practices. I hear from many others by phone. They turn to the religious community for help and solace and often sustenance after being victimized by their unstable working conditions.

There is a debilitating impact upon the entire community. People feel hopeless and helpless. Families, particularly women and children, are being hit the hardest by this growing injustice. Their feelings of insecurity deepen as the gap widens between management and labor in our Nation.

Senator METZENBAUM. Can you wind up, please, Reverend?

Rev. FULWIDER. Yes, sir.

This is not a matter of personal preference. It is a matter of human justice and moral responsibility. It is about respecting the dignity of workers. I am here to plead the case for the silent majority of workers who quietly and conscientiously work honorably. On their behalf, I ask you to give your support to this legislation which is essential to restoring the balance which is not there now in the working relationship.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Reverend Fulwider.

[The prepared statement of Reverend Fulwider follows:]

PREPARED STATEMENT OF REVEREND BRYAN G. FULWIDER

Good morning Mr. Chairman and members of the committee. Thank you for the opportunity to speak with you this morning regarding Workplace Fairness legislation. My name is Reverend Bryan G. Fulwider, I'm here representing the National Religious Committee for Workplace Fairness, of which I am a member. I'm also the chairperson of the Arkansas Religious Committee for Workplace Fairness, a chapter of the National Committee. Also, I serve as the president of the Arkansas Interfaith Conference which represents 11 faith communities in Arkansas, with a total membership in excess of 450,000 persons of faith.

There is a new and growing coalition between religion and labor in our Nation. The coalition is new, only in the sense that it represents a reawakening on an historical stance. People of faith have always had genuine concern for issues surrounding the dignity of all working people. People who labor with honesty and integrity in vocations of every type deserve to be treated with respect and fairness. In recent years there has been a continuing erosion of the balance necessary for effective collective bargaining. It is this continuing erosion which makes Workplace Fairness legislation so very necessary.

We have all heard of a place called Hope. Hope, AR to be precise. In the recent election the name of this town became a household word. But you may not know about a place called Champion Parts Rebuilders in Hope, AR. Champion Parts Re-

builders is a story about people. People who have been destroyed by having their jobs taken from them in the midst of a legal strike. A strike not over higher wages, but rather a strike which began as negotiations broke down around the issue of lessened health care coverage. The workers simply could not afford higher health care deductibles. The company was not in trouble financially, but they still wanted the workers to shoulder the burden of the company's reduced costs for health care coverage. The workers were asking only for continued, reasonable coverage. They had even agreed to a 20 percent cut in coverage from the level they had been receiving. But a company called Champion Parts Rebuilders, in a place called Hope, stubbornly refused to even discuss the issue further. Even after the contract had expired on April 21, 1991, and the company substituted on inferior health insurance policy, the workers continued to work and negotiate until September 4, trying to resolve the impasse. But after the company gave the "take it or leave it" ultimatum the workers took the only recourse they had and announced a legal strike.

The workers fully expected temporary replacement workers to be brought in, that, after all is what's done in many cases. They never, however, expected to be permanently replaced by a company to which many had given heart and soul in their labors for many years. But that's exactly what happened. Following a corrupt and immoral lead from others, dating back to the days of Ronald Reagan and the Air Traffic Controllers, Champion Parts Rebuilders in Hope, AR, began to permanently replace their workers. There was no more collective bargaining, no more fair negotiation, no more justice, no more equanimity, no more Labor Relations Act of 1935, and finally, no more jobs for the workers of Champion Parts Rebuilders.

Minnie Muldrew was in her late forties, she worked in "heavy duty starters," a piece of equipment weighing 70–120 pounds. Minnie weighed about 130 pounds. It was after April, the health care benefits had already been cut-back, that's when it happened. Minnie felt very poorly on this particular day, she knew that she had used her seven sick days, she would be fired if she took one more. So she "toughed" it out, went to work, she worked on the heavy duty starters all day, but the pneumonia which she didn't know she had, was dragging her down. When the 3:30 whistle blew at the end of the day, she moved slowly toward the time clock, but she never made it, the heart attack she had stopped her before she got there. The new policy only covered $35,000 on major medical. She was stuck with nearly $50,000 in medical bills. She was making about $6 an hour as a single mother with a child in college, before she was permanently replaced!

At another Arkansas company, Morrilton Plastics, workers were also permanently shut out of their jobs. Following a long series of negotiations workers were permanently replaced. The company finally closed its doors rather than reconcile. In another case in Arkansas, Harvest Foods, one of our largest grocery store chains, threatened in newspaper adds to permanently replace workers if they chose a legal strike. The threat effectively halted fair negotiations in the collective bargaining spirit and process. Workers did not even continue in negotiations but rather continued to work in less than satisfactory conditions rather than to risk being permanently replaced. More recently, several hundred paper workers in Crossett, AR have been permanently replaced.

Each week in my office, in a rather small parish, I meet with a number of people who are affected by current unfair labor practices, and I hear from many others by telephone. They turn to the religious community for help, solace, and often sustenance after being victimized by unstable working conditions. There is a debilitating impact upon the entire community. People feel hopeless and helpless. Families, particularly women and children, are being hit the hardest by this growing injustice. Their feelings of insecurity deepen as the gap widens between management and labor in our Nation. We are the only industrialized Nation in the world not to protect our workers with this basic human right. Even South Africa enacted legislation in late 1991 to protect their workers from being permanently replaced.

This is not a matter of personal preference, it is a matter of human justice and moral responsibility. It is about respecting the dignity of workers. To give companies the right to permanently replace their workers tears at the very fabric of a nation built on liberty and justice for all. I am here to plead the case for the silent majority of laborers who work quietly, conscientiously, and honorably. On their behalf, I ask that you give your support to this legislation which is essential to restoring the necessary balance that makes working relationships fair and equitable. If we fail, to protect justice for working people, then justice for all people hangs in the balances.

Mr. Chairman and members of the committee, I thank you for your valuable time and your gracious ear regarding the issue of Workplace Fairness.

Senator METZENBAUM. Our last witness on this panel is Juanita Landmesser of Hope, AR.

Ms. LANDMESSER. Good morning. My name is Juanita Landmesser, and I am the chairperson of my local union in Hope, AR. Thank you, Senator Metzenbaum, for the opportunity to be here this morning to tell you why the legislation banning hiring of permanent replacement workers is so urgently needed.

I worked for Champion Parts Rebuilders at two different periods of time—from 1967 to 1979, and from 1985 to 1991. Champion is located in Hope, AR, and at the time our strike began, they did more than 80 percent of the Nation's automotive rebuilding work. Any automotive part that can be rebuilt is rebuilt by Champion.

Because our plant employed low-wage workers averaging about $6 an hour, we rebuilt the low-cost electrical components like alternators, generators, starters, and windshield wiper motors.

I worked on the line for 18 years. At the same time, I moved into leadership positions in my union—as a shop steward, a local union president, and the first woman to chair a statewide UAW CAP council. I also served as a trustee for 18 years for the International Union, UAW.

The Champion Parts plant was built in 1960, and the UAW has represented the workers in that plant since that time. Our UAW members built the plant from fewer than 50 workers to a peak of more than 600 in 1990—without any serious labor problems. The union and the company had such good working relations that up until 1982, no grievance had ever even been arbitrated, and we never had a strike in the plant until 1991.

Our wages were low. Many of our members were already living below the poverty level. And over the past 5 years, our wage increases totalled only 60 cents an hour—that's not 60 cents a year, that's 60 cents over 5 years.

The low wages were in no way representative of the very difficult and dangerous work we performed. Our jobs were hot, dirty, fast and heavy. For years, I was responsible for cleaning auto parts using trichlorethylene, a cancer-causing agent. I then moved those parts from the disassembly area to the line, using a hand truck to pick up by myself 50-gallon barrels full of generator, alternator and start parts. We used many hazardous cleaning agents, and workers suffered from lots of back injuries, skin and respiratory problems, and many types of cancer. But until 1991, at least we had good health insurance to protect us.

The union had negotiated 100 percent coverage and a $250,000 yearly maximum for major medical. The workers paid 24 percent of the premium and a $25 deductible. During the 1985 contract negotiations, the union agreed to allow Champion to become a self-insured company. During the 1988 contract negotiations, the UAW agreed to concessions requiring second opinions on certain procedures and that specific surgeries be done on an outpatient basis.

At the start of the contract talks in February 1991, the company decided to strip the health insurance we had had for more than 20 years. Champion demanded that workers continue to pay 24 percent of the premium costs, and that workers pay a substantially increased deductible for individual and family coverage as well as a 20 percent copayment for any costs above the deductible. The company also lowered the maximum from $250,000 to $35,000 a year, with a lifetime maximum of $100,000.

At the time the strike started in September 1991, some UAW workers had major health problems costing in excess of $50,000 to the worker.

Altogether, these changes in the health insurance coverage for workers making $6 an hour would have been an impossible burden.

However, even if the company had not chosen health care as an issue, they could have found another issue to force us out.

Our members didn't want to strike. We offered to take cuts in our health insurance. Specifically, we agreed to an increase in the deductible, and we agreed to the 20 percent copay. We offered to reduce by 50 percent coverage for nervous and mental ailments. But we felt that we could not survive with a $35,000 yearly maximum and that a yearly maximum of $250,000 was needed because of the large numbers of serious illnesses.

However, the company absolutely refused to budget from its position. The workers could not accept the company's demands because we make such low wages. Without decent health coverage, our wages could not support us.

The UAW workers at Champion voted by secret ballot, as all UAW strikes are begun, including Caterpillar, in September 1991 to strike over the issue of health care protection. Five months after our contract had expired, about 300 UAW workers walked out of the Champion plant. Eighteen months later, there are still about 250 of us still walking the picket line.

The fact is that after winning a union and an NLRB vote, all companies have to do to destroy unions is cut out all benefits, force the union out on strike, and replace the union members. If eliminating labor unions is your idea of progress, as was mentioned earlier, then the companies are certainly making progress.

Champion was a profitable company. We never heard the company plead poverty as the reason for cutting health care benefits. But with an unemployment rate in the community above 9 percent, there were many individuals ready to step into our jobs during the strike. We are now convinced that the company knew we could not accept such severe cuts in health care and that it planned to force us out on strike in order to bring in permanent replacements.

Senator METZENBAUM. Can you wind up, please?

Ms. LANDMESSER. Yes. They offered us a $4.84 starting wage, which was a cut of $1. As soon as we went on strike, they started hiring people at $5.84 an hour. They refused to continue dues deductions. When a company refuses to continue dues deductions on a union, the union is virtually powerless; they have no way to collect union dues. And we were forced out.

We are now looking for a way back in. We feel that we served them for three decades. They have no loyalty to us even though we had loyalty to them, and we tried our best to continue on our jobs.

Thank you for giving me this opportunity to be here today.

[The prepared statement of Ms. Landmesser follows:]

PREPARED STATEMENT OF JUANITA LANDMESSER

Good morning. My name is Juanita Landmesser. Thank you, Senator Metzenbaum, for the opportunity to be here this morning to tell you why the legislation (S. 55) banning the hiring of permanent replacement workers is so urgently needed.

I worked at Champion Parts Rebuilders, Inc. at two different periods of time—from 1967 to 1979 and from 1985 to 1991. Champion is located in Hope, AR and

at the time our strike began, did more than 80 percent of the Nation's automotive parts rebuilding work. Any auto part that can be rebuilt is rebuilt by Champion. Because our plant employed low wage workers (averaging about $6 an hour), we rebuilt the low cost electrical components like carburetors, generators and windshield wiper motors. I worked on the line for 18 years. At the same time, I moved into leadership positions in my union—as a shop steward, a local union president and the first woman to chair a statewide UAW CAP council. I also served as a trustee for 18 years for the International Union, UAW.

The Champion Parts plant was built in 1960, and the UAW has represented the workers in the plant since that time. Our UAW members built the plant from fewer than 50 workers to a peak of more than 600 in 1990—without any serious labor problems. The union and the company had such good working relations that up until 1982, no grievance had ever been arbitrated, and we never had a strike in the plant until 1991.

Our wages were low. Many of our members were already living below the poverty line. Over the past 5 years our wage increases totaled only 60 cents per hour.

The low wages were in no way representative of the very difficult and dangerous work we performed. Our jobs were hot, dirty, fast and heavy. For years I was responsible for cleaning auto parts using trichlorethylene, a cancer-causing agent. I then moved those parts from the disassembly area to the line, using a hand truck to pick up by myself 50 gallon barrels full of generator, alternator and starter parts. We used many hazardous cleaning agents, and workers suffered from lots of back injuries, skin and respiratory problems, and many types of cancer. But at least we had health insurance to protect us.

We had 100 percent coverage fully paid by the company and a $250,000 yearly maximum for major medical. The workers paid 24 percent of the premium and a $25 deductible. During the 1985 contract negotiations, Champion became a self-insured company and joined a health maintenance organization. During the 1988 contract negotiations, the UAW agreed to concessions requiring second opinions on certain procedures and that specific surgeries be done on an outpatient basis.

At the start of the contract talks in February 1991, the company decided to strip the health insurance we'd had for more than 20 years. Champion demanded that workers continue to pay 24 percent of the premium costs, and that workers pay a substantially increased deductible for individual and family coverage as well as a 20 percent copayment for any costs above the deductible. The company also dramatically lowered the yearly maximum from $250,000 to $35,000, with a lifetime maximum of $100,000. At the time the strike started in September 1991, some UAW workers had major health problems costing in excess of $50,000. Altogether, these changes in the health insurance coverage for workers making $6 an hour would have been an impossible burden.

Our members did not want to strike; we offered to take cuts in our health insurance. Specifically, we agreed to an increase in the deductible and we agreed to the 20 percent copay. We offered to reduce by 50 percent coverage for nervous and mental ailments. But we felt that we could not survive with such a low yearly maximum, and that a yearly maximum of $250,000 was needed because of the large numbers of serious illnesses among the workers. However, the company absolutely refused to budge from its position. The workers could not accept the company's demands because we make such low wages. Without decent health coverage, our wages could not support us. The UAW workers at Champion voted to strike over the issue of health care protections. In September 1991, 5 months after our contract had expired, about 300 UAW workers walked out of the Champion plant. Eighteen months later, there are about 250 of us still walking the picket line outside of the Champion plant.

Champion was a profitable company; we never heard the company plead poverty as the reason for cutting health care benefits. But with an unemployment rate in the community above 9 percent, there were many individuals ready to step into our jobs during a strike. We are now convinced that the company knew we could not accept such severe cuts in health care, and that it planned to force us out on strike in order to bring in permanent replacements.

During the negotiations, the company threatened us with replacement if there was a strike. After the strike began, the company advertised for workers and sent an ultimatum to all of us that if we did not return to work within a few days, we could be replaced. Within a week after the start of our strike, the company was hiring permanent replacement workers. One year after the strike began, the company sent the union a second letter in September 1992 stating that the UAW workers had been permanently replaced.

What has happened to the hundreds of striking workers? Most of us are still on strike. Some of us are working in service jobs. Very few of us are working full time.

We are all feeling the stress and anxiety of not working. Parents have separated and divorced. In one case, a husband was left to care for his six children without utilities in his home because they were cut off when he could not pay his monthly bills. Workers in Hope, AR are no different from workers in any other part of the country who lose their jobs. We have lost a sense of self-worth; we cannot take care of our families; and we don't know what kind of future there will be for us or our families.

I am working full time in a restaurant owned by my husband and cooking hamburgers. My daughter works at the restaurant too. She had been a supervisor at Champion and the company fired her. I filed a discrimination complaint with the NLRB, and the company was forced to re-instate my daughter but as an hourly wage worker. When the union members voted to strike, she too went out.

For more than three decades, Champion was well-served by loyal workers that were committed to their jobs and the company. There was no such commitment from the company to us. We desperately need to restore a sense of justice and fairness to the workplace by preventing companies from hiring permanent replacement workers. Thank you for giving me this opportunity to be here today.

Senator METZENBAUM. I want to thank all the witnesses. We do have a few questions, but there is a roll call vote on the floor of the Senate, and we are going to recess for that. And I am advised that there will be another roll call immediately following that one, so we may have a 15- or 20-minute recess. I want to say to the next panel that we do want to hear from you, and we will find time to hear from you, so please stand by. I have no choice but for Senator Jeffords and I to go to the floor to vote. Thank you.

The committee stands in recess.

[Recess.]

Senator METZENBAUM. The committee will come to order. Witnesses will take their place at the witness table, please.

Ms. Landmesser, how many of the replaced workers have been able to find comparable employment somewhere else in your community?

Ms. LANDMESSER. If I were to make a guess, I would probably say less than ten. Most of our people, 60 percent of the people, are now getting some kind of government assistance, food stamps or AFDC. A lot of the families have broken up. They are really having a tough time of it. A lot of people have gone to the service industry—McDonald's, Burger King. I am cooking hamburgers in a restaurant that my husband manages. It is the only job I was able to find in the area. I have been everywhere looking for a job. I signed up for unemployment compensation. I have signed up for jobs at the employment office, and I can't get hired except by my husband, and he has to take me.

Senator METZENBAUM. Ms. Zavala, did the workers offer to arbitrate the remaining issues and return to work last summer?

Ms. ZAVALA. Yes, they did, but they told us that they would only take 60 of us back.

Senator METZENBAUM. And that is out of a total of how many?

Ms. ZAVALA. Almost 500.

Senator METZENBAUM. What about the other 440?

Ms. ZAVALA. That's what we'd like to know. We said we all come back together, not just 60 of us. They want to be able to pick and choose who they want.

Senator METZENBAUM. I'll ask either of you or the reverend, how many of the replaced workers have been able to find comparable employment somewhere else, and have many of the workers encountered age discrimination in their job search?

Ms. ZAVALA. There have been a few, not that many. But for age discrimination, there has been a lot. It is really devastating, because we have the qualifications, and then all of a sudden they say, like they told me, "We'll call you."

Senator METZENBAUM. Reverend Fulwider, the religious community clearly has nothing to gain from passage of this legislation, and yet you are here today on its behalf to support the bill. Tell me the reason that you are present and willing to testify.

Rev. FULWIDER. The primary reason that we have begun to work again in coalition with labor is because of the continuing erosion of fair labor practices. We believe the passage of this bill will help to stabilize.

I believe it was Senator Kennedy or Senator Harkin who talked about the playing field and the levelness of it. It seems to me that it is very difficult to talk about a level playing field if I'm playing soccer with you, and I tell you to get off the field and don't come back, that we can have a game. What this legislation does is recognize that both parties need to stay on the field, that the conversation needs to remain open.

Our issue is one of human justice, and it is one of compassion. I spend a great deal of my week meeting with and seeing folks who are being affected by this kind of practice going on of permanent replacement of folks, of the destruction of jobs; families are being negatively affected week in and week out. It is just a continuing erosion.

We have opened a second major shelter in the Little Rock area, and that shelter's primary responsibility is for families rather than just for individual persons who are out of work and indigent. It is for families, because entire families are being shut out of homes. And that facility is now full, and we are unable to even meet the needs in a city the size of Little Rock, which is not a gigantic city.

Senator METZENBAUM. Do you have just about the entire religious community united in your position?

Rev. FULWIDER. In the National Committee, we have a coalition of 21 religious groups which includes the Jewish community, the Islamic community, and all of the major Protestant and Catholic groups are involved with the National Coalition, and our State Coalition is also represented by that kind of broad mix of folks, yes.

Senator METZENBAUM. Is it that you see this as an ethical and moral imperative to ban the use of permanent striker replacements?

Rev. FULWIDER. Yes, very much so.

Senator METZENBAUM. My last question, Ms. Zavala and Ms. Landmesser, given the hardships you and your coworkers have endured, if you had to do it over again, would you choose to strike?

Ms. ZAVALA. Yes.

Ms. LANDMESSER. We had that discussion among many of our union members during the last gathering we had last Wednesday, and we said then we had no choice, and that is still the truth. We had no choice. There was just no other solution.

Senator METZENBAUM. Well, your testimony is very moving, and we very much appreciate it.

Ms. Zavala, I don't know how you did it, but to hear you testify that you are a great-grandmother affects your credibility—not that I don't believe you. [Laughter.]

Ms. ZAVALA. I have been saying, too, that we come in as young mothers and young fathers, and we are leaving as young grandparents.

Senator METZENBAUM. Thank you very much. We hope to be able to respond with passage of this legislation.

I turn now to Senator Jeffords, and I will excuse myself to make a phone call.

Senator JEFFORDS. Thank you, Mr. Chairman. I just want to make sure that their full statements be entered into the record. I think they were tremendous statements, and they ought to be part of the record.

Senator METZENBAUM. The entire statements of each of the witnesses will be included in the record. Thank you for bringing that to my attention.

Senator JEFFORDS. Thank you, Mr. Chairman.

You did give very moving testimony. I am one who is trying to look for solutions to the problems that we have, and the area that seemed to be one of the core causes of the problems was health care and the ability to provide health care. To me, that is one area that this Nation must do something about, and as you know, President Clinton is dedicated to that cause.

Your experiences are an example of why it is becoming even more necessary with respect to the problems of work forces. I believe, Juanita, you mentioned that your business became self-insured; is that right?

Ms. LANDMESSER. In 1985 negotiations, our company asked to cut their health care—they had Blue Cross/Blue Shield prior to that time, and in those negotiations, the union agreed to allow the company to become self-insured in order to cut costs.

Senator JEFFORDS. In previous testimony before this committee, we began to get ideas and reasons why if you become self-insured, it also becomes desirous to replace the workers. The reason for that is that—and we have a great-grandmother here—older workers are more expensive to insure and to take care of the health costs than younger workers are. So if you can replace your older workers with younger workers, then your health care costs will go down for the company and for the members. That's point number one, and that is a serious problem.

I have been working on a health care plan for some 2 years now which would eliminate that problem, and I have talked to the unions about it, and with respect to retired workers, it would also remove their problems. But it is those kinds of pressures that we have got to solve so that we don't have the pressures to replace workers.

For instance, we found in our examination of the health care situation that if we unshifted all the costs, you could be insured for full coverage with a good benefit package for a premium of about 6 percent, with 4 percent being paid by the company. If you take that, and you think that you could get full coverage for something like 30 cents in your own case, 10 cents an hour, that would be very inviting to you as workers, would it not?

Ms. LANDMESSER. Senator, it certainly would, and the UAW is one of the strongest supporters of national health care legislation. But as you mentioned earlier, there is another benefit to a company becoming self-insured that is really over and above the actual cost of the premium, and that is the fact that they are not covered by any laws. No State laws cover self-insured companies. They can literally decide whom they want to pay bills on and whom they don't, and there is nothing you can do to force them to pay those bills.

Senator JEFFORDS. That's another problem; that's exactly right.

Ms. LANDMESSER. In our case, health care was the issue that we went out on strike on, but we are focusing this whole discussion on health care, and the company could easily find another issue if they wanted to force us out, other than health care.

Senator JEFFORDS. That presumes that they would want another issue, and I don't know the facts, and hopefully, that wouldn't be the case. But I am saying that if we can take care of the health care problems, we could remove those pressures that are there now, especially when you have relatively low paid workers, because the problem there is that it costs as much to cover the low paid worker as it does a relatively high-paid worker—there may be some more coverage, but basically, it costs the same thing—whereas if you base it on a premium based upon payroll, then there is actually an advantage to taking care of your lower paid workers.

That is why I feel very strongly that it is incredibly important for this Nation to get a good health care plan, and then some of these other problems, which are incidental but very important to the health care situation, would also be taken care of.

I want to commend you for your very excellent statements. They certainly make us all want to think very carefully about how we can solve the problems which you have talked about.

Ms. LANDMESSER. Certainly, the payroll costs would be cut a great deal. As you estimated, 6 percent would be the cost to the companies if we had national health coverage of some type, whereas now, at Champion, for instance, I am sure that the cost of our health care plan was probably 30 percent of the cost of our payroll. So you are absolutely correct; the companies would save great deals of money.

Senator JEFFORDS. And you would get as good or better coverage. So that is the kind of answer——

Ms. LANDMESSER. Well, of course, that would depend on the health care plan.

Senator JEFFORDS. Well, if it was a national, required benefit package which everybody had, so that everybody would be treated the same.

Well, that is my hope that we will come up with a solution sometime before at least a year from now.

Senator Hatch.

Senator HATCH. Thank you.

I want to thank each of you for being here. We appreciate your testimony and we appreciate having you with us.

Thank you.

Senator HATCH. We'll call at this time the following witnesses: Jerry Jasinowski, president of the National Association of Manu-

facturers; Dr. Richard L. Lesher, president of the United States Chamber of Commerce, and S. Jackson Faris, president and chief executive officer of the National Federation of Independent Business.

Senator METZENBAUM. Thanks, Orrin.

Gentlemen, we are very happy to have you with us this morning, and Mr. Jasinowski, if you would like to proceed first, we'll be happy to hear from you. You know of our 5-minute rule.

STATEMENTS OF JERRY J. JASINOWSKI, PRESIDENT, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, DC; RICHARD L. LESHER, PRESIDENT, UNITED STATES CHAMBER OF COMMERCE, WASHINGTON, DC; AND S. JACKSON FARIS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, WASHINGTON, DC.

Mr. JASINOWSKI. Thank you very much, Mr. Chairman, members of the committee.

The National Association of Manufacturers is very pleased to testify at this most important hearing on this far-reaching labor-management legislation, the most far-reaching in 50 years, and that can have and would have an extraordinary impact on the balance of power in industrial relations in favor of labor unions.

S. 55 would tip the balance between labor and management and change the whole dynamics of the workplace. What would justify such a radical change in the way labor and management relate to each other and the environment in the workplace?

As well as I can understand it, Mr. Chairman, having listened very carefully to Secretary Reich this morning, the argument very simply, from his point of view and yourself and others, is that there was a deterioration in the climate of labor-management relations in the 1980s that was profound, and as a result of that, we should change this fundamental balance which has been in place for over 50 years.

I would like to challenge that basic premise and would start out my testimony by arguing that labor-management relations actually improved in the 1980s in manufacturing and that manufacturing itself has an extraordinarily revival which was based in large part on a focus on quality, improved teamwork, a breakdown in the hierarchical structure of labor and management in most manufacturing companies, and that the vast majority, the overwhelming majority of manufacturing firms in this country, are in fact pursuing enlightened labor-management relations based on such teamwork and shared responsibility.

I have submitted to Secretary Reich at his request a list of approximately 20 companies, Mr. Chairman, that reflect those kinds of practices, and I would ask that they be submitted for the record.

Senator METZENBAUM. Without objection, they will be included in the record.

[Information referred to was not supplied.]

Mr. JASINOWSKI. Beyond that, Mr. Chairman, I am doing a book, 100 Manufacturing Success Stories, and the first chapter is on empowering employees, and there are, I think, 36 companies which again are extraordinary success stories in the empowerment of

workers, and I would hope that we could have that chapter in the record because I think that these success stories are matters the committee should focus very carefully on.

Secretary Reich changed from saying there were a few "bad apples," characterizing management, to saying it had "poisoned the well." The fundamental factual issue before this committee is have labor-management relations improved in the 1980s, or have they deteriorated. And I submit—and I would make the following points——

Senator METZENBAUM. Isn't the fundamental issue, Mr. Jasinowski—and I don't mean to interrupt you—not whether they have or have not improved, but isn't the fundamental question whether or not use of permanent striker replacements has improved the labor relations?

Mr. JASINOWSKI. Yes, I think that that is the key issue of this legislation, but the related issue is again the charge that labor-management relations have deteriorated and have deteriorated in large part because of the use of permanent striker replacements.

So, taking your point in mind, Mr. Chairman, I would go on and make five brief points to argue against the premise that we need this legislation.

First, we have a united business community opposing this, the most united I have seen on any issue in my experience. Now, I grant you that employers can often be wrong about these matters, and our interests are at stake here. But why is it that you've got such an overwhelming majority opposing this? You have because management feels that it has in fact improved labor-management relations in the eighties and that the use of permanent striker replacements is not something which has caused major difficulties with respect to those relationships.

Second, we do not need the change in labor law now contemplated. If you look at the overall situation, we have stable or declining strike patterns by the studies that have been measured.

Finally, it is incongruous to us that you would consider passage of such important legislation when Secretary Reich has put forward this commission to in fact improve labor-management relations, a commission which we support and which we think this is a fundamental issue in the context of all of that.

Third, this would change irrevocably the balance between labor and management. That is a balance which is sound. I would like to submit for the record again, Mr. Chairman, an analysis by John Irving that goes back to the 1935 Wagner Act and which shows that in the legislative history of that Act that in the delicate balance that was struck, while you could not fire a worker, you could in fact have permanent replacements. The language says: "The broader definition of 'employee' in S. 1958 does not lead to the conclusion that no strike may be lost or that all strikers must be restored to their jobs, or that an employer may not hire new workers, temporary or permanent, at will."

Senator METZENBAUM. Can you wind up, please?

Mr. JASINOWSKI. My fourth point, Mr. Chairman, is that this would actually increase conflict between labor and management.

And my final point is that we need to work toward cooperation in the workplace. That's what I think these companies are doing.

That's what the NAM wants to do. And this legislation would work against that.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

[The prepared statement of Mr. Jasinowski follows:]

PREPARED STATEMENT OF JERRY J. JASINOWSKI

Mr. Chairman and members of the subcommittee. I am Jerry Jasinowski, president of the National Association of Manufacturers. On behalf of our 12,000 members, I appreciate the opportunity to appear before you to comment on NAM's position on S. 55, the Workplace Fairness Act. I am pleased to do so in the company of colleagues from the National Federation of Independent Business and U.S. Chamber of Commerce.

My purpose this morning is to give an overview of the NAM position and not a dissertation on the legal nuances associated with the issue of permanent replacement of strikers. To that end, I am pleased to have John Irving join us at the table. Mr. Irving, a former General Counsel of the National Labor Relations Board, is available to answer technical and legal questions. With your permission, I will submit for the record a more detailed discussion of NAM's position on S. 55.

Stated plainly and simply, the NAM and its membership are unalterably opposed to S. 55 or any change in Federal labor law regarding strikes or striking workers during a labor dispute. The position of NAM members is, I believe, one that is universally held throughout the employer community—businesses large and small, those whose employees are represented by unions and those that are not.

And the collective "we"—among NAM membership and across the employer community—are every bit as united in our opposition to S. 55 as are those who are pressing for its enactment. I tell you this based on many conversations I have had on the issue with our members at Board of Directors meetings, Congressional Dialogues and in our offices. So, I wish to put to rest any question about business' position on S. 55 and its House counterpart, H.R. 5. The opposition is singular, it is broad-based and it runs deep.

The issue is not about fairness or discrimination against workers who choose to withhold their labor in pursuit of economic gains. That is the perception created by proponents. The reality, however, is that we are talking about balance of the economic powers that employers and employees can exercise during a labor dispute.

That balance—the right of workers to strike and the right of employers to continue operations during a strike with replacement workers was explicitly contemplated by the framers of the National Labor Relations Act. The right of employers to use permanent replacement workers is not a product of U.S. Supreme Court dicta, as proponents have alleged. That right was only affirmed by the U.S. Supreme Court in the 1938 *Mackay* decision and has been reaffirmed by the Congress, courts and the National Labor Relations Board since then. But the courts and the Board have also been judicious and consistent in protecting the rights of striking workers.

And, until recently, there were no serious efforts by the Congress to address the issue, even the highly contentious labor law reform efforts mounted during the administration of former President Jimmy Carter did not include such provisions. I believe the rationale for not including a ban on the use of permanent replacement is every bit as valid now as it was then—the change is unwarranted.

I have, to this point, talked in generalities, let me move to specifics—my experiences on the Collective Bargaining Forum. It is comprised of chief executives of major companies and presidents of international trade unions. The NAM is also a participant. The Forum's objective is to discuss the role of unions and business and how we advance our mutual interests through the collective bargaining process. I raise this as an expression of NAM's support of collective bargaining.

I raise it also to demonstrate that while Forum participants seek to reconcile differences in our respective points of view, it is not always possible. There are many areas, many issues on which we have been able to achieve consensus. One issue, however, on which consensus has been elusive is striker replacement. We have agreed to disagree—on numerous occasions—within the Forum just as NAM disagrees with proponents of S. 55 and H.R. 5.

The collective bargaining process set forth in the National Relations Act of 1935 and amended in 1947 and 1959 is premised on a balance of economic powers that employers, employees and unions may bring to bear. The Wagner Act conferred on employees the right of freedom of association and concerted activity including a vir-

tually unfettered right to strike. These are fundamental rights which the NAM supports.

At the same time, the Congress recognized in the NLRA that just as employees had the right to strike or withhold their labor, employers had the right to continue operations through use of permanent replacement workers in an economic strike.

Mr. Chairman, I am not aware of any reason for Congress to change the law that has well served the Nation for more than half a century. I know that proponents have alleged that the practice of permanent replacement workers was not used frequently until the 1980's and that the firing of air traffic controllers—who were engaged in an illegal strike—by former President Reagan is frequently cited as giving rise to the practice. That is simply not true.

Permanent replacement of economic strikers is an action that has been selectively used by employers during the past five decades in response to economic strikes. It is not a weapon to used casually or without conscious thought any more than is the strike which also is a weapon.

My experience on the Collective Bargaining Forum and through comments with NAM members is that the system has functioned well—and it has—because both sides have something at risk. It is a form of check and balance, the right to strike and the right to permanently replace. Collective bargaining has functioned well because each side recognizes that it has the ability to inflict pain on the other—at a price. Remove the risk from either side and you alter the equation, its balance.

What would follow from passage of S. 55? Not enhanced labor-management relations as proponents have alleged but more strikes. For example, in Canadian provinces that prohibit permanent replacement of strikers, more strikes of longer duration occurred than in provinces without such a ban. More strikes is not an objective which any of us desire.

Mr. Chairman, some concluding thoughts. First, that we are in an increasingly competitive global economic environment has become a cliche. Where our competitors have well developed bodies of labor law, it is true that many of them ban permanent replacement of strikers.

Importantly, though, they do so in labor law contexts that are very different from our own. The example of Germany is not atypical. There, while strikers may not be permanently replaced, neither can strikes be engaged in by workers if the Government makes a finding that the strike would "grievously wound" the company that is struck. Put differently, there, the right to strike is conditional; here, it is fundamental.

Second, precisely as a consequence of the increased global competition, the flexibility of American companies is restricted. Certainly, additional costs—whether imposed by economic consideration or by government—are more difficult to pass forward by raising prices. Too often these days, they must be passed back—that is, to workers—in the form of lower compensation or lower employment.

This proposed changed in labor law would have an analogous effect. The greater uncertainty for employers about their ability to weather a strike or resist unreasonable wage demands could prompt many to inoculate themselves by relying less on U.S. labor, achieving the exact opposite of the proponents' intent.

Accordingly, NAM urges that the subcommittee reject S. 55.

EXECUTIVE SUMMARY

The National Association of Manufacturers strenuously opposes legislation pending before the Subcommittee on Labor, S. 55, that would deny an employer's longstanding right to continue operations during an economic strike.

Under the rubric of ensuring a level playing field in labor-management relations, the legislation would effect an unwarranted tilt in the balance of power between labor and management contemplated by framers of the National Relations Act, affirmed in 1938 by the U.S. Supreme Court and reaffirmed ever since.

While the right of employees to withhold their services to protest terms and conditions of employment, i.e., to strike, is the centerpiece of U.S. labor law, it does not exist in a vacuum. National labor policy also provides rights to employers, among them, the right to continue operations during an economic labor dispute, through use of permanent replacements.

National labor policy during more than half a century has provided for essential, equitable and delicate balances in the responsibilities and obligations of employers, employees and unions in the exercise of their respective economic powers. Though not perfect, the collective bargaining process has served the Nation well because of these balances.

S. 55 would dramatically rewrite U.S. labor law in a manner that would disrupt labor-management relations and discourage industrial peace, the central objective of the National Labor Relations Act.

Accordingly, the NAM urges the subcommittee to reject S. 55.

Senator METZENBAUM. Dr. Richard Lesher, president of the U.S. Chamber, we are happy to see you again, sir.

Mr. LESHER. Mr. Chairman, thank you very much for inviting us. We are pleased to be here and pleased to be in alliance with the other two organizations represented here today.

As Mr. Jasinowski said, the business community is united. In the Chamber, we house the Alliance to Keep Americans Working, and this Alliance embraces not only these three organizations but literally hundreds of thousands of companies and many associations.

The members of that Alliance have come to total agreement on this bill for a number of reasons that I would like to share with you. First of all, the balance that we have heard so much about this morning would indeed be tilted in favor of organized labor. Second, it is very clear that this legislation would encourage more and longer strikes and discourage the friendly workplace relations that we have heard so much about this morning. Third, it is special-interest legislation, very plain and simple, which will pit nonunion labor against organized labor. A large percentage of every work force having chosen not to be represented by the striking union will nevertheless be forced to accept the consequences of substantially reduced business operations during the strike and thereafter, when the employer attempts to regain his market share.

Fourth, employees, whether union or nonunion, who elected not to join the strike would be placed at a very serious disadvantage relative to strikers because the bill requires employers to favor returning strikers over nonstrikers.

I would like to submit my entire statement for the record as well as the statement of the chairman of our labor relations committee. And I would like to sum up by telling you that our Nation does not need more and longer strikes. Contrary to previous testimony this morning, we have been experiencing fewer strikes in a long-term trend lasting more than 30 years.

Second, we have better labor-management relationships than at any time in the last several decades. Third, there has been less use of striker replacement in the eighties than there was in the seventies.

I urge the committee to reject this legislation as bad for workers, as bad for consumers, and as bad for America.

Thank you very much.

Senator METZENBAUM. Thank you very much, Dr. Lesher.

[The prepared statement of Mr. Lesher follows:]

PREPARED STATEMENT OF RICHARD L. LESHER

I. INTRODUCTION

I am Richard L. Lesher, President of the U.S. Chamber of Commerce. I appreciate the opportunity to present to the subcommittee this statement opposing S. 55.

Members of the U. S. Chamber are in total agreement that this bill is absolutely unacceptable and that there can be no compromise on this issue. We are committed to insuring that more than 50 years of balance in our labor laws is not undone.

The U.S. Chamber houses the Alliance to Keep Americans Working, or AKAW. The Alliance is a unified coalition of over 300 corporations, business organizations and associations dedicated to preserving employee and employer collective bargain-

ing rights. The Alliance coordinates the grassroots and lobbying efforts of its members as they work to educate Members of Congress and the public about the serious dangers of this legislation.

The members of the Alliance share total agreement that this bill is absolutely unacceptable and that there can be no compromise on this issue.

We arrived at this position for the following reasons:

S. 55 destroys the well-thought-out labor-management balance and tilts the current level playing field in favor of organized labor.

The legislation encourages more and longer strikes and discourages friendly workplace resolutions. With one side (the unions) having all the chips, there is little incentive for that side to cooperate or compromise.

The bill, along with so-called compromises such as "moratoriums," will provide an incentive to strike and delay resolution of labor-management disputes. The result will be automatic strikes as unions flex their muscles with impunity, certain that there is no risk in their position.

It is special interest legislation—plain and simple—that will pit nonunion labor against organized labor. A large percentage of every work force, having chosen not to be represented by the striking union, will nevertheless be forced to accept the consequences of substantially reduced business operations during the strike and thereafter when the employer attempts to regain market share.

Employees, whether union or nonunion, who elected not to join the strike would be placed at a serious disadvantage relative to strikers because the bill requires employers to favor returning strikers over nonstrikers.

Furthermore, the Chamber and the AKAW are convinced that there is no fallback position. Current law is fair to all parties. The bill also is especially untimely.

At a period of intense international competitiveness, the survival of companies and the jobs they provide are truly at stake. Companies in almost every industry face tough international competitors. These companies cannot afford to have unions dictating their costs.

The Administration has appointed a Commission to assess the long-term future of cooperation between management and labor. While we are concerned about the composition of the commission and harbor reservations about the objectivity of its membership as a whole, we nevertheless look forward to providing the Commission with sufficient input from the business community. At least on the surface, it is seeking to find nonlitigious and nonregulatory approaches to improve cooperation between management and labor. Congress should not attempt to enact legislation that could preempt the Commission's work.

II. DELICATE BALANCE

The essence of the legal framework for collective bargaining is the delicate balance of economic power between the parties. That balance was established in 1935 with the Wagner Act. The collective bargaining system created in 1935 has withstood the test of time. It guarantees to employees the right to engage in concerted activity, including strikes. It also requires employer good-faith bargaining and that employers will not discourage employees from engaging in collective activity.

The framers of our labor law realized that neither party to labor negotiations will work to reach agreement or compromise unless the economic powers they possess are equal. Accordingly, Congress gave employees and unions the right to strike in order to force an employer to agree to contract demands. Likewise, employers were given the right to continue in business during a strike by hiring replacements who would continue to work during the strike. With both parties so empowered, there is a mutual interest in reaching agreement. Thus, the law encourages innovation and compromise. Neither party has the upper hand.

Employees have the right to strike to enforce their economic demands. They also have the right to return to their jobs after the strike unless their employer, exercising its right to continue operating during a strike, has replaced them. Of course, if the employer causes or prolongs the strike by violating the labor law, the strikers are guaranteed immediate reinstatement at the end of the strike.

There is a level playing field for collective bargaining. This legislation would substantially tilt the playing field in the unions' favor. Over fifty years of stability and fairness would be turned on its head.

III. SOLUTION WITHOUT A PROBLEM

This bill is a solution in search of a problem. Some claim that the use of striker replacements increased dramatically after 1981. Several studies analyzing objective data, including one by the Bureau of National Affairs in 1991, and another by the

Employment Policy Foundation, conclusively show that the incidence of replacement strikes remained relatively constant throughout the 1970's and 1980's. Readily available objective evidence shows that, when necessary, employers have hired permanent replacements for economic strikers since 1935.

A Government Accounting Office study of replacement strikes revealed that only 4 percent of strikers were replaced in 1985 and a mere 3 percent in 1989. The study did not reveal when the replaced strikers were rehired. A study by the Bureau of National Affairs in March 1992 revealed that 74 percent of strikers who were replaced in 1991 had returned to their jobs at the time of the study. Clearly, the claim that permanent replacement is tantamount to discharge is not supported by the facts.

The stated purpose of the Wagner Act, also known as the National Labor Relations Act, is to "encourage friendly adjustment of industrial disputes." Ironically, this bill will do just the opposite. By making one party all-powerful and removing the incentive to compromise, this bill will encourage more and deeper disputes between unions and management. There will be more strikes and less reliance on "friendly" resolution of workplace disagreements.

IV. NO COMPROMISE

The Chamber, along with every other member of the coalition opposed to this bill, firmly believes that there cannot be a compromise. Alleged compromises discussed or considered when the Senate debated this measure last year, are fatally flawed for a number of reasons.

Some suggested a "moratorium" or a ban on the hiring of striker replacements for a defined period following the commencement of a strike. Any moratorium, regardless of length, serves to remove a union's incentive to avoid a strike. In fact, it would encourage strikes because unions most likely would wait until the end of such a moratorium, as the employer grew increasingly desperate, to engage in serious efforts to reach an agreement. More importantly, a moratorium would still endanger the public health and welfare should a health care facility or other provider of essential services be forced to cease or curtail operations during a work stoppage, even for a limited period.

Another proposal offered last year involved a requirement that employers surrender their right to continue operations during a strike and submit contract disagreements to an arbitrator. This proposal, like a moratorium, gives one party, the union, the power to force concessions and eliminates the incentive to compromise.

The business community is firmly convinced that there can be no "compromise" on this issue.

V. INTERFERENCE WITH COMMISSION ON LABOR LAW

The Secretary of Labor, Robert Reich, and Secretary of Commerce Ron Brown formed a Commission on the Future of Worker-Management Relations. The Commission's purpose is improve labor/management cooperation and employee participation by examining current labor laws.

The Chamber has some concerns that the Commission could depart from its charter to address three stated questions concerning labor law and labor management cooperation. We also have concerns about the composition of the Commission and harbor reservations about the objectivity of its membership as a whole. We suspend judgment until they release their findings. Since they are not scheduled to come out with recommendations until March of 1994, it makes sense to give them the opportunity to deliberate. Activity on this legislation should be suspended at this time. Congress should not be working to preempt the Commission.

VI. SPECIAL INTEREST LEGISLATION

This is special interest legislation, plain and simple. Organized labor represents a mere 11.5% of the private-sector work force. Clearly, the intent of this bill—to give enormous economic power to unions—is an effort to facilitate union organizing. Employees who have exercised their right not to engage in collective bargaining through a union will be offered unchecked economic power and encouraged, if not forced, to surrender their right to act on their own behalf.

Obviously, this legislation would, in many cases, pit unionized employees against those who have chosen not to be represented by a union. Nonunion employees would have to face the cessation of business operations, and resulting layoffs, whenever union employees working for the same employer, or employers upon which their company relies for business, engage in a strike. As this bill would encourage strikes, rather than compromise and cooperation, nonunion employees would face reduced opportunities and maybe even periods out of work.

By its express terms, this bill requires employers to favor those who go on strike over those who may exercise their right not to strike. Non-strikers would be displaced by returning strikers. Their experience and job progress during a strike would be reversed and the employer prevented from recognizing their achievements during the strike.

VII. CONCLUSION

We don't need more and longer strikes. Jobs, our ability to compete in the global economy, and our economic progress are at stake. Without doubt, this bill would have a substantial adverse impact on all three. There is no middle-ground. Giving unions more power so they can dictate terms in collective bargaining is unacceptable.

Mr. Chairman, I would also like to submit for the record a statement from Bill Stone, Chairman of the Chamber of Commerce Labor Relations Committee.

The U.S. Chamber of Commerce Federation of more than 215,000 organizations strongly opposes this bill and urges the members of this Subcommittee to reject it. Thank you for this opportunity. I would be pleased to answer any questions.

Senator METZENBAUM. Mr. Jackson Faris, president and chief executive officer of the National Federation of Independent Business, we are happy to have you with us.

Mr. FARIS. Mr. Chairman, thank you for inviting us.

Senator Hatch, good morning.

I represent the National Federation of Independent Business. We are the Nation's largest small business advocacy organization, with a membership exceeding 600,000 small and independent business owners nationwide.

Our membership employs over 7 million people, reports an annual gross sales of approximately $747 billion. Our typical member has six to eight employees and grosses about $250,000 to $300,000 in annual sales, with net revenue to the owner of approximately $35,000 per year.

We are a bit different in that our maximum dues to be a part of our organization is $1,000, so as not to have any individual or group of companies control the policy.

Second, our policy comes from the mandated ballot, which we go to our membership five times a year, and that's where we stand on issues from our members. And one of the issues that we have put to a vote to our membership is the whole S. 55 proposal. Our members have consistently opposed so-called labor law reform over the years. Our membership specifically opposes any attempt to curtail the right of an employer to permanently replace a striking worker. In fact, in a recent survey, 81 percent—81 percent—of our members opposed enacting striker replacement legislation.

As president of this organization, I am here today to express the concerns of small business owners regarding S. 55 and to join with the entire business community to confirm our immovable opposition to this bill.

When Congress enacted the National Labor Relations Act, its intent was to establish a balance between labor and management, and S. 55 would dismantle this delicate balance which has been in effect for over 55 years, 5 years longer than NFIB has been in existence.

In a strike, each side has an inherent risk. Strikers can be permanently replaced, while the employer risks losing the business if it cannot successfully operate through a strike.

NFIB represents many family-owned businesses. Our small business owners view the work force as a part of the family. In fact,

one of the definitions of small business owner is one who still knows the names of the grandchildren and the children of the employees. We are very proud of our employees and the relationship we have to the key viability and success of our business. Small businesses are a model of cooperation in today's work environment.

Clearly, S. 55 poses serious practical problems for small business. Of deepest concern to our members is that S. 55 appears to be an undisguised attempt to aid a special interest in organizing. It sets up two classes of workers to be at odds with each other. Congress should not be in the business of creating or enhancing legislation which would skew the organizing advantage toward unions. In fact, a recent Time-CNN poll showed that 73 percent of the American people believe that unions have enough or too much power currently. We think this legislation is bad.

The ripple effect would be most troubling in that we have no say in triggering the strike as small business; we have no ability to affect its outcome.

Small business, our Nation's economic backbone, desires to grow and to create real jobs, not tax-paid for created jobs in government. S. 55 would send a real message of fear, not hope, to the producers of jobs in America—free enterprise people and their employees.

Please protect America's most endangered species—small business. S. 55 is a job destruction bill for America's small business and in fact for free enterprise.

Thank you very much.

Senator METZENBAUM. Thank you very much, Mr. Faris.

[The prepared statement of Mr. Faris follows:]

PREPARED STATEMENT OF S. JACKSON FARIS

The National Federation of Independent Business (NFIB) is a small business advocacy organization made up of more than 600,000 small and independent business owners nationwide. Our membership parallels the national business population in that approximately 50 percent of our members own retail and Service enterprises; 25 percent are in manufacturing and construction; and the remaining 25 percent operate agricultural, transportation, mining, wholesale, financial, insurance or real estate enterprises. Our membership employs 7 million people and reports an annual gross sales of approximately $747 billion. The typical NFIB member has 8 employees and grosses about $250,000 in annual sales.

NFIB members have consistently opposed labor law reform over the years, and our membership specifically opposes any attempt to curtail the right of an employer to permanently replace a striking worker. In fact, in a recent survey, 81 percent of NFIB members opposed enacting striker replacement legislation. As president of the Nation's largest small business advocacy group, I am here today to express the concerns of small business owners regarding S. 55 and to confirm our immovable opposition to the bill.

When Congress enacted the National Labor Relations Act (NLRA), its intent was to establish a balance between labor and management. S. 55 would dismantle this delicate balance which has been in effect for over 55 years.

Under the NLRA, employees are allowed to strike over economic references. At the same time, employers have a right to operate their businesses during a strike by hiring replacements. The right of the employer to hire permanent replacements was confirmed in 1938 by the U.S. Supreme Court in the *MacKay* decision, and this right has subsequently been reaffirmed several times by the Court.

In a strike, each side has an inherent risk. Strikers risk being permanently replaced, while the employer risks losing the business if it cannot successfully operate through a strike. These relatively equal risks were intended by Congress to balance the bargaining process so that no one side had the advantage. If S. 55 is enacted, it would provide unions with a risk-free bargaining tool and would allow them to hold businesses hostage until union demands are met. It would be destructive to many businesses, to jobs and to the productivity of our country.

In recent years, attempts have been made to insulate small business from the adverse affects of S. 55. These efforts have failed because the bill poses not only a direct, but also an indirect threat to smaller businesses.

DIRECT EFFECTS

Small businesses are labor-intensive. If several key employees walk off the job and cannot be permanently replaced, the business' ability to survive could be seriously jeopardized. Often in a small business every employee is a key employee. Take for instance a small plumbing contractor with 10 employees, eight of whom are plumbers. Five employees, all plumbers, walk off the job in protest over wages. Under S. 55 these plumbers are guaranteed their jobs back whenever they choose to return. The owner, in the meantime, is left without 50 percent of his work force and two-thirds of his key employees.

S. 55 would allow the owner of this plumbing firm to hire temporary replacements and to substitute management personnel for the jobs left open. However, in a small business setting, neither option is feasible. In most cases, the employer is the management, the accountant, the benefits specialist and the trouble shooter. The owner of the firm could not continue to fulfill all these duties and cover the job demands of the five plumbers who walked off the job. Temporaries would be extremely difficult to find. Where would a plumbing contractor find five experienced plumbers to fill the five vacant positions for an indefinite (perhaps only 2 weeks) period of time? This is even more problematic in rural areas.

Some have stated that temporary replacements are easily accessible to most firms. This is not the case. Unlike larger companies, small businesses do not normally use temporary placement services because of the cost. Instead, they find employees by placing a "help wanted" sign in the window or by word of mouth.

NFIB represents many family owned businesses. Frequently, small business owners view their work force as part of the family. They are proud of the cooperative relationship they have with their employees because they know how vital each is to the viability of their business. Small businesses are a model of cooperation in today's work environment.

Labor Secretary Robert Reich has stated many times that the labor-management climate should be more cooperative. I would say to Secretary Reich and the committee, that for the most part, it is cooperative, but if this legislation is enacted it will become more confrontational and disruptive because the number of strikes in both large and small firms will increase dramatically. In this regard, S. 55 seems to be the antithesis of what the Administration is trying to accomplish. Let me reiterate—if S. 55 is enacted, it will erode the present attitude of cooperation that now exists in the small business work place and move us toward a more confrontational one.

Clearly, S. 55 poses serious practical problems for small businesses. However, of perhaps deepest concern to NFIB members is that S. 55 appears to be primarily a union organizing tool. The bill would set up two classes of workers—those who are protected during strikes (union member or those in a union certification process) and those who are nonunion and, therefore, not protected in strikes. Many of these nonunion employees are employed by small business owners.

In setting up two classes of workers, S. 55 clearly attempts to promote union membership and union organization. It explicitly gives union members economic and legal advantages denied to nonunion employees. It would create a situation in which unions could guarantee the jobs of workers if they join the union, and it would arguably put a ceiling over the career opportunities of any worker who remained on the job or returned to the job during a strike. Such lopsided legislation is a direct threat to nonunion business owners who believe unions already have too much power. Simply put, Congress should not be in the business of creating or enhancing union organizing tools.

It is evident by recent statistics that union membership is declining rapidly. In addition, a recent Time/CNN poll found that 73 percent of the American people believe that unions have too much or just the right amount of power. Despite this, Secretary Reich has publicly stated that he is "deeply committed to reversing the trend" of union decline. While S. 55 is likely to help slow union decline, small business owners feel S. 55 is inappropriate and unnecessary. Unions only represent a small percentage (11.5 percent) of the private work force. But keep in mind this legislation will have an adverse impact on the entire work force.

By creating a setting that favors confrontation, the practical effect of S. 55 is more strikes, diminished competitiveness and lost productivity. This has been exhibited in Canada, where a law similar to S. 55 exists.

INDIRECT EFFECTS

No strike takes place in a vacuum. It has repercussions on those employees who choose not to strike, the customers of the struck company, the small businesses that contract out their services to a struck company, and most importantly small businesses in the immediate vicinity of the struck company. Take for instance a restaurant or gasoline station which caters to a plant's workers. A short strike would hurt business; a long one would destroy it and the jobs created. The restaurant would not have the customers it once had, so it would have no other choice but to scale back its work force by laying off employees. Eventually it would not have the revenue coming in to keep up with overhead costs, leading it to bantruptcy.

The small business contractor is also indirectly impacted by a large company being struck in what is referred to as the "ripple effect." Let's use the example of a plumbing contractor again. The firm has a $1 million contract with a local builder to do all the plumbing work on a new construction project. Knowing that a contract of this size would tax the firm's resources, the plumbing contractor has turned down other projects until this job can be finished.

The electrical union representing the electricians working on the same construction project strikes for higher wages. Further construction cannot take place until the electrical work is complete. As a practical matter this leaves the construction at a standstill. While under current labor laws other construction trades may report to work under the "reserved gate doctrine," shutting down one craft at a critical stage in the project may have the effect of disrupting the entire project.

Meanwhile, our plumbing contractor has purchased the supplies needed to complete the job. All pending work has been rescheduled and no bids have been offered on other work. In a strike, the plumbing contractor then remains idle, not knowing when the strike may end and fearing to commit to new obligations that may cause the firm to be spread too thin.

The bills for the surcharged supplies come due. Cash reserves are depleted to pay the bills. The owner can only hope that the strike will not last long. If it does, plumbers will have to be released because they cannot remain on the payroll with no revenue coming in. Without work and without plumbers, the small business defaults on its obligations. Ultimately, if the strike is of any real duration, the plumbing contractor faces possible closure and bankruptcy.

These are but a few examples of the ripple effect on small businesses if S. 55 is enacted. The most troubling aspect of the ripple effect of S. 55 is that small businesses have no say in triggering the strike and have no ability to affect its outcome. The small business owner is at the mercy of the unions and the company. The ripple effect of S. 55 is a practical, real life problem for small business owners.

Some have tried to argue that small business concerns about the ripple effect are unfounded. Let me tell you, it is very real outside the beltway. I travel the country and meet with small business owners every day, and I hear time and time again that striker replacement legislation, if enacted, will have devastating consequences.

Some have suggested a moratorium on hiring striker replacements as an alternative or compromise, meaning that permanent replacements could not be hired for a certain number of weeks. Such a moratorium could be economic suicide for small businesses. It would affect them disproportionately because most do not have the resources to sit out a strike, to transfer work to another location, to substitute managerial and supervisory personnel for striking employees or to recruit temporary replacements. It would also assure that the length of the strike would be guaranteed to last for the duration of the moratorium. Not only would the small business productivity be disrupted, it would be unable to compete equally with larger competitors who can weather the effects of a strike. If a small business is, in effect, shut down for a moratorium during an economic strike, it most likely will never recover.

CONCLUSION

In closing, I would like to say I appreciate the opportunity to testify before you today. Small business owners believe S. 55 can only be characterized as a classic example of legislation that is a solution in search of a problem. NFIB does not see any way to reach an accommodation that provides striker replacement protection to some and not to all. And since our over 600,000 members oppose striker replacement legislation, so must we.

Finally, as I was reading the Wall Street Journal after the passage of the family and medical leave bill, I came across an editorial headline entitled "Job Destruction Bill Number One." If S. 55 passes the headline would read "Striker Replacement: Job Destruction Bill Number Two."

Senator METZENBAUM. We'll have ten-minute rounds, Senator Hatch.

I wonder if any of you would care to comment on the testimony of Ms. Zavala, a great-grandmother, working, getting $5 or $6 an hour, and the company cut back the health care benefits. They certainly were not getting high wages, and it wasn't a matter of not getting more; it was a matter of not getting less in rising inflationary times.

Were you not moved by her and by Ms. Landmesser? These seem to be decent Americans who really were not radical union organizers. These were working people. These were people who wanted to bring up their families.

Mr. JASINOWSKI. I was very moved, Senator, by the testimony, and I was even affected by the testimony of the representative of the labor unions. I think that the human issues when you get to a very specific case are quite real and moving. And being from a labor family myself, where we were in unions all my life, I personally can identify with that.

I think the issue is are there enough cases like that—and I'm not making a factual judgment on the company; I don't know the company that well—but are there enough cases like that to merit Federal law. And I would submit that there has been a tendency to distort the number of companies that have used permanent replacements to take advantage of labor and disrupt labor-management relations. So I think the case is very specific.

I do not think you can show that a large number of manufacturing companies have done anything like that, and therefore I don't think Federal law is justified.

Mr. FARIS. Senator, could I add to that, please?

Senator METZENBAUM. Sure.

Mr. FARIS. One of the things we talk about are the anecdotal stories that are very meaningful and specific, including Senator Harkin's brother. What tears at our hearts is when an entrepreneur, who not only has the $35,000 to $40,000 a year in income at stake, but sometimes their very house on the line for the credit of the business. This legislation would put thousands of those people and their families and their four or five employees out of work, over which they have no control.

Senator METZENBAUM. How would it do that, Mr. Faris? I don't quite understand how it would put them out of business? I just don't quite follow. I was a businessman before I came to the Senate.

Mr. FARIS. Well, let's see if we can pursue that line of thought, Senator. If in fact we have prolonged strikes in an area, what happens if a major company goes on strike? Those people, then, who may have been going out to the restaurant to eat, who may have been buying flowers, who might have been purchasing other goods in small retail stores in that community, will not be purchasing. The sales will be gone, and therefore the owners of the business know that the bank cannot be paid, and therefore they are faced with going out of business.

Senator METZENBAUM. I understand——

Mr. FARIS. But because of prolonged strikes, Senator—we don't need longer strikes.

Senator METZENBAUM. But striker replacement legislation doesn't create prolonged strikes. All it says is that you don't bring in permanent striker replacements. You can bring in temporary replacements. Employers have done that for years.

When I was in the business world, I don't know of anybody who thought of bringing in striker replacements. And there is no secret about it—Secretary Reich is not sure this was the factor that tipped the scales—but it was the PATCO strike and the action of the new President at that time in firing the PATCO employees that seemed to send a message. After that, we saw, for example, an absurd situation at the New York Daily News. Never before in my political career have I known of an archbishop coming to testify on behalf of employees because he thought it was so wrong, and that's what happened in the New York Daily News strike.

I wonder, Mr. Faris, whether you'd be good enough to submit to the committee a copy of the questions that were asked of your members, because I believe your members are decent, law-abiding, good American citizens, good employers, who don't want to do anything to hurt their employees, who don't want to see employees of other employers hurt.

And here is woman who really gets peanuts, literally peanuts, working for a nut company, Diamond Walnut Co., and they go out on strike to protect their health benefits—and they are already paying 24 percent of the health benefits themselves, which is quite unusual, you would agree.

Mr. FARIS. Senator, you have two parts to that. One, I thank you very much for your observation, which I think is very accurate, of the small business owner in America. And I think, Senator, we have well-meaning, well-intended people who are elected, who come to this chamber and similar, who do not intend to put small business out of business.

Senator METZENBAUM. None of us do.

Mr. FARIS. But in fact, by passing the legislation, Senator, that's an end result. And what I heard this morning is the first I have heard of this case. It seems to me there was a health care problem, the cost of health care, and a debate over health care—not striker replacement. It seems if we solve the health care problem and work on that with the Heal Coalition and other organizations that are working on it, we wouldn't have this problem of the strike in the first place.

Senator, the information that there are more strikes in the eighties, I'm sorry, is just not true. Statistics show over and over again that there have been more strikes in the seventies than there were in the eighties. There were more people replaced in the seventies than in the eighties.

What happened with——

Senator METZENBAUM. I think there is some dispute as to the factual reality of that, but let me ask you a question, Mr. Faris. In the past, the small business community opposed the legislation because you claimed that it would apply to nonunion businesses. So we amended the bill 2 years ago to make clear that it applies only if a union has won an election or obtained written authorizations from a majority of the employees. We didn't want it to apply to the nonunion employer.

Now the bill will not affect the vast majority of your members at all. Now you protest that the bill sets up two classes of workers, protecting only unionized workers. I don't understand you, because you seem to be talking out of both sides of your mouth. First, you were complaining that we were affecting nonunionized employers, and now you are complaining that the bill doesn't affect nonunionized employers. Which should we do? We'll do whatever you want. We'll go back to the old bill, if you want.

Mr. FARIS. Senator, we haven't found anything about the bill that we like. What happens is you cannot look at a union situation—for instance, a construction site—that has union companies and nonunion companies. If a small contractor has the cleanup contract on a fairly large construction project, a union contractor, and let's assume that some of the plumbers, five out of nine plumbers, decide to go on strike. Well, when they go on strike, that impacts the cleanup contract. There is no way you can pass legislation that impacts labor, period, that tilts the balance away from where it has been for 55 years, and not impact small business. The ripple effect alone is tremendous, Senator.

Senator METZENBAUM. Of course. It affects the whole community. But you can't change that. When there is a strike, it affects the whole community. There is no question there is a loss of buying power, and we aren't going to ban strikes——

Mr. FARIS. Absolutely, and we believe S. 55 encourages strikes, it encourages unionization, it puts power in the hands of the labor bosses who have been suffering defeats because there is less need for them now than ever before. So why, then, should we pass this legislation?

Senator METZENBAUM. Mr. Faris, as long as I have been around, you could put it to violin music, I have heard about "Those labor bosses, those labor bosses."

Mr. FARIS. Yes, sir.

Senator METZENBAUM. That lady who testified, I guess she is a labor boss, the one who lost her job. She was a leader in the union, and so was the other lady a leader in the union. Are those the "labor bosses"?

Mr. FARIS. The labor bosses are the people who will take advantage of this, will benefit by this. Very few employees, if any—in fact, we think employees will be hurt by this, not helped by it. And I know, Senator, what you are saying and what Secretary Reich says; it is well-meaning, well-intended, and the theory plays well, but in the reality of the business world, of trying to propose a product and a service, to be competitive in a world market, this will encourage strikes, longer strikes; it will make us less competitive and less productive; it will cut jobs, and it will hurt the American people. It is just not good legislation. It is not needed, Senator.

Senator METZENBAUM. I would hope someday before I leave the Senate I would have the privilege of having the small business community come forward, represented by you, and say that you are for something that helps workers and helps the people of this country. I have never heard you do that.

Mr. FARIS. Senator, we have said that a number of times. One of the things is the Heal Coalition with health care that can help every American have health care. We have been working on that

for 3 years. We have pushed it, we promoted it for 3 years. Senator Bentsen proposed the health care plan last year, and it was bottled up in Congress and not passed. There are a number of positive, progressive things that we are doing to try to help small business.

Senator, if the government would leave small business alone, if small business had the opportunity to grow jobs, most of the ills we have in this new job formation and all the problems would be solved.

Senator METZENBAUM. The next time I come to a Federal handout for small business, I am going to call you and ask you to write a letter to members of the Senate indicating that you are opposed to the handout that the Federal Government is giving to small business.

Let me get a last question in to Mr.——

Mr. FARIS. If you'll give us an equal playing field, Senator, we'll be glad to do that.

Senator METZENBAUM. Let me give a question to Mr. Lesher. Under Federal law, workers cannot be terminated for exercising their civil rights or for seeking to enforce their right to a minimum wage or for reporting unsafe conditions. At the same time, workers can be permanently replaced for exercising their protected right to strike. How can you distinguish the Mackay rule from these basic protections? Is it fair for Congress to grant workers the right only to make the loss of their jobs the price of exercising it?

Mr. LESHER. Their right to rehire is still protected under the law when that job is available.

Senator METZENBAUM. The right to——

Mr. LESHER. To rehire at the end of the strike.

Senator METZENBAUM. Certainly, but the fact is once there is a permanent replacement that holds their position, they aren't really much in a position to do much about it.

Let me ask Mr. Jasinowski a question. In the past, a witness for the NAM testified that employers don't use the Mackay rule to get rid of unions. He stated that you don't fire a Patriot missile until a scud is on its way. Then he went on to say permanent replacement is not an offensive weapon. Isn't it more like a nuclear weapon? Its mere existence means that workers will be afraid to resort to strikes out of fear of annihilation?

Mr. JASINOWSKI. Mr. Chairman, I would make a couple of points in response to your question. First, I think that the letter I submitted earlier shows that the historical debate on the Wagner Act contemplated the use of permanent replacements as part of the balance of power between labor and management, and that letter shows that to be the case.

So it is a weapon. The second point is that that weapon has been used since that time on and off, but never in any major way, and there is no evidence to show that it has accelerated sharply in the 1980's. So I think that it is a weapon. I think the whole issue of strikes versus replacements are both last resorts to be used by labor and management, and we would like to see that decrease and have more cooperation. But if you are going to take away one, you'd have to take away the other, and I don't think any of us really are contemplating eliminating the right to strike.

So I think both of those would indicate that this is not something which our companies resort to easily, and it is not on the increase, and that in fact what everyone is striving to do is to increase the amount of cooperation between labor and management.

Mr. Chairman, if I could, I would also like to submit for the record an analysis by Diamond Walnut Growers on this labor dispute. I cannot vouch for the specifics of it, but John Irving, general counsel for the National Labor Relations Board in the past, has given it to me, and I'd like it to be in the record so that the company could have some defense.

Senator METZENBAUM. Mr. Jasinowski, you have offered three separate things—a chapter from a book, a list of companies, and this statement as well. This chair has some concern about how we spend the government's money, but we will take it in, and we'll take a look at it. We'll certainly include it for the record, but whether we include it in the printed record or not, I'll let me staff decide.

Mr. JASINOWSKI. I appreciate that, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

Senator Hatch.

Senator HATCH. Thank you, Senator Metzenbaum.

I would ask that three statements be inserted in the record—one from David Westfall and John Gray, a professor of law at the Harvard Law School. I have the same Diamond Walnut thing, so whichever you want to choose. And then, some statements from the Associated General Contractors.

[The prepared statements of Mr. Westfall and Mr. Gray, Diamond Walnut Growers, and the Associated General Contractors of America follow:]

JOINT PREPARED STATEMENT OF DAVID WESTFALL AND JOHN L. GRAY

INTRODUCTION

As a professor of labor law, I feel an obligation to point out why S. 55 reflects unsound policies and would be unfair to nonstriking employees and to the consuming public, as well as to employers. The following statement is largely derived from my article in the Winter, 1991, issue of The Labor Lawyer, "Striker Replacements and Employee Freedom of Choice."

SUMMARY

Far from being the modest revision that its backers portray, S. 55 would fundamentally change our labor laws. Protection of employee freedom of choice either to strike or to refrain from striking—a basic principle of our labor laws ever since 1947, when the Taft-Hartley Act substituted a more balanced approach for the one-sided favoritism of unions under the original Wagner Act—would be replaced by a mandated preference for strikers. Excessive and unreasonable union bargaining demands for wage increases and inefficient work rules would no longer be limited by the possibility that a strike could lead to permanent replacement of the strikers, with the following likely results:

1. Employees would be free to strike repeatedly, for any reason and often with no advance notice to their employer, no matter how unreasonable their demands. Their jobs would always be waiting for them unless and until their employer eliminated the jobs or was forced to go out of business;

2. Employees who chose to exercise their right under §7 of the NLRA to work, rather than to join in a strike, would be permanently deprived of any recognition, by promotion or new work assignments, of jobs well done or new skills acquired during the strike;

3. Struck businesses often would be unable to operate efficiently with temporary replacements and nonstriking employees. Some firms would be forced to

close, and might never reopen. The inevitable result would impose heavy burdens on consumers and small businesses, as well as on the struck firms;

4. The mandated preference for strikers, without regard to the cause of the strike, would reduce the incentive under present law for employers to bargain in good faith. Today employers know that their failure to do so may cause the strike to be characterized as an unfair labor practice strike, so that the strikers would enjoy an unqualified right to reinstatement. Without this incentive, employers would be less likely to bargain in good faith. The inevitable result would be more strikes, longer strikes, and greater hardships for consumers and small businesses.

None of the arguments for this unnecessary and unwise legislation will withstand analysis.

ANALYSIS

S. 55 would amend §8(a) of the National Labor Relations Act (NLRA), which defines unfair labor practices of employers. It would make comparable changes in the Railway Labor Act (RLA), which also governs labor relations in the airline industry.

Under new §8(a)(6)(i), it would be an unfair labor practice for an employer to promise, threaten, or take other action to hire a permanent replacement for an employee in a unit for which a labor organization had been certified or recognized as exclusive representative at the commencement of a labor dispute, or which was seeking to be certified or recognized as such on the basis of written authorizations by a majority of unit employees, if the employee engaged in concerted activities in connection with the labor dispute.

This provision would abrogate the long-standing doctrine, derived from language used by the U.S. Supreme Court in its 1938 decision in the Mackay Radio case, under which employers are permitted to permanently replace employees who strike over economic (but not unfair labor practice) issues in order to continue business operations during a strike.

New §8(a)(6)(ii) would make it an unfair labor practice for an employer to

"withhold or deny any other employment right or privilege to an employee, who meets the criteria . . . of clause (i) and who is working for or has unconditionally offered to return to work for the employer, out of a preference for any other individual that is based on the fact that the individual is performing, has performed, or has indicated a willingness to perform bargaining unit work for the employer during the labor dispute."

This second provision would supercede the U.S. Supreme Court's decision in *Trans World Airlines* v. *Independent Federation of Flight Attendants* (*TWA* v. *IFFA*), 489 U.S. 426 (1989), under which an employer subject to the RLA (and presumably the same result would follow under the NLRA) is not required to discharge either replacement employees or "cross-overs" (strikers who return to work before the strike ends) in order to make room for unreinstated strikers with greater seniority.

This bill would cause a major change in the present balance of power between employers and unions—a balance that has served us well by protecting the right of employees to organize and bargain collectively without making them the exclusive owners of their jobs, no matter how high the wages or how restrictive or inefficient the work rules they may seek to impose in contract negotiations. At the same time, the Mackay doctrine has protected the right of employees to choose to work, rather than going out on strike—a right which has been protected by the NLRA ever since the enactment of Taft-Hartley in 1947. Under S. 55, employers would be forced to discriminate in favor of strikers and against nonstriking employees by permanently denying the latter group any recognition, by promotion or new work assignments, of jobs well done or new skills acquired during the strike.

Proponents of such a radical realignment in the way present law balances the interests of strikers, employers, and nonstriking employees bear a heavy burden to justify the proposed change—a burden which they have yet to discharge. None of the major arguments commonly advanced for this purpose will withstand analysis.

ARGUMENTS OF PROPONENTS

Proponents commonly make the following major arguments against the permanent replacement of economic strikers under the Mackay Radio doctrine:

(1) employees should not risk loss of their jobs for exercising the right to strike—a basic right protected by the NLRA;

(2) employers rarely need to hire permanent replacements in order to operate during a strike;

(3) replacement employees receive at best only an illusory permanency of employment;

(4) permanent replacement of strikers generates violence while the strike continues and hostility and ill will when it ends;

(5) employers use the risk to employees from permanent replacement of strikers as an argument against unions in representation elections and the reality of such replacement to rid themselves of unions and union sympathizers;

(6) Mackay Radio was a product of its times, when the doctrine of employment at will gave employers the unqualified right to fire employees for any reason or no reason and is incompatible with current statutory and judicial protection against wrongful discharge;

(7) Canadian and other foreign experience with a ban on hiring permanent replacements demonstrates that employers can find temporaries to do the work;

(8) striking employees' bargaining demands are moderated by the loss of their paychecks.

An additional argument made against the U.S. Supreme Court's holding in *TWA* v. *IFFA*, which denied unreinstated strikers with greater seniority the right to displace nonstriking employees and strikers who had previously returned to work, is that it permits employers to "bribe employees to break ranks with their fellows and the union . . . reducing its militancy and effectiveness."[1] However the fundamental question here, as with the Mackay doctrine itself, is whether to continue meaningful protection of the right of employees to choose to work rather than to join in a strike.

As the following analysis will demonstrate, none of the foregoing arguments carry conviction.

(1) Risk of job loss by strikers for exercising a protected right

Protection of the right to strike has never meant that exercise of that right shall be free from all unfavorable consequences. If the law were otherwise, employers would be required to continue to pay wages while employees are on strike in order to avoid burdening the right to strike with loss of a paycheck.

What protection of the right to strike clearly does require is that returning strikers shall not be discriminated against in relation to nonstriking applicants for available positions. Indeed, for 30 years after the U.S. Supreme Court's decision in Mackay Radio, the position of the NLRB was that employers were not required to give replaced economic strikers who applied for reinstatement any preference over other applicants. Permanently replaced economic strikers merely had the right not to be penalized for their concerted activity, and were not entitled to preferential status in hiring.

However, in 1967 the U.S. Supreme Court held in *Fleetwood Trailer* v. *NLRB*, 389 U.S. 375 (1967), that the hiring of new employees when there are outstanding applications for reinstatement from strikers is presumptively a violation of the Act, unless the employer demonstrates a "legitimate and substantial" business reason for the failure to hire the strikers. The following year, relying on Fleetwood, the Board in Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), held that employers were required to give preferential treatment to strikers' applications for reinstatement, which are sometimes referred to as "Laidlaw rights." For over two decades this mandated preference for strikers has been recognized in order to protect the right to strike, overcoming the explicit protection in NLRA section 7 of the right of all employees to refrain from concerted activities.

Admittedly, from a striker's viewpoint, being permanently replaced may seem similar to being fired for striking, as his preferential right to reinstatement over other job applicants does not guarantee him a job. However, if strikers were not subject to the possibility of permanent replacement, it is unclear what if anything would limit their bargaining demands. They would be free to strike repeatedly until such demands were met, knowing their jobs would always be waiting for them unless the employer abolished the positions or went out of business. As *TWA* v. *IFFA* illustrates, even the possibility of permanent replacement under present law does not inhibit unions from demanding wages that are almost four times the rate required to fill all vacancies. Without that possibility, one can only speculate as to how high union bargaining demands would reach.

(2) Employers' need for permanent replacements

[1] See, Hearings on S. 2112 (Amendment to the NLRA) before the Subcommittee on Labor and Human Resources, 101st Cong., 2d Sess. (June 6, 1990) (statement of Professor Julius Getman, University of Texas Law School at 8).

Although some struck employers operate with supervisors and nonstriking employees and others manage with temporary replacements, it is difficult to imagine others doing so successfully. Skilled employees are unlikely to be willing, unless the demand for their services is unusually slack, to fill a striker's job without some assurance that they are not subject to discharge whenever the striker offers to return. For example, if the teaching staff of an educational institution walked off their jobs, it seems highly unlikely that the school would be able to attract temporaries of equal caliber to fill their places.

(3) Illusory "permanency" for replacements

The permanency afforded replacements under present law may be far short of absolute, and does not eliminate the possibility of discharge. Nevertheless, the possibility of continued employment may make a job far more attractive to a prospective striker replacement than the same job would be if. he knew he was subject to discharge at any time.

(4) violence and hostility from the presence of permanent replacements

It is undeniable that strikers sometimes do react violently to the hiring of permanent replacements and that the hostility such hiring engenders may persist after the strike ends. However, even the hiring of temporary replacements sometimes produces a violent response. And it is not easy to justify abrogating the freedom of choice of nonstriking employees and limiting the protection of employer and consumer interests merely because of illegal, violent conduct of striking employees, rather than taking more direct steps to deter such conduct.

(5) permanent replacement of strikers as an argument against unions in representation campaigns and as a means of deunionizing

Fear of permanent replacement as a result of a strike doubtless influences some employees to vote against union representation. But a ban on such replacement would at most reduce, not eliminate, such fears. Fear of plant closure or curtailed production as a response to union demands or union contracts could continue to influence election outcomes.

The employer who provokes a strike in order to avoid bargaining with a union and to permanently replace union adherents risks being guilty of a refusal to bargain in good faith, so that the strike is an unfair labor practice strike with an unqualified right to reinstatement for the strikers. And the employer who seeks to use the presence of striker replacements and nonstriking employees as a basis for good faith doubt of a union's majority status must take account of the refusal of the NLRB, recently upheld by the U.S. Supreme Court in Curtin Matheson Scientific, 110 S.Ct. 1542 (1990), to presume that such employees do not support the union.

(6) Mackay Radio as a product of its times and the then prevalent doctrine of employment at will

Some proponents of S. 55 assert that Mackay Radio is an outmoded product of an earlier era, when the doctrine of employment at will held sway, and that it is incompatible with increasing statutory and judicial protection against wrongful discharge. However, there is a qualitative difference between protection against wrongful discharge afforded whistle-blowers on public policy grounds, for example, and protection from loss of employment of employees who leave their jobs voluntarily.

(7) Canadian and other foreign experience with a ban on permanent replacement of strikers

Proponents of S. 55 sometimes refer to the experience in foreign countries, particularly in Canadian provinces, whose labor laws are sometimes described as being most nearly comparable to ours, as demonstrating an absence of adverse effects from such a ban. For example, in Ontario, strikers enjoy an absolute right of reinstatement during the first 6 months of a strike. Quebec goes farther than even most proponents of the pending bill now propose and bars employers from using any replacements, either temporary or permanent, nonstriking employees, or outside contractors to perform struck work.

Whether or not the Canadian experience supports enactment of similar legislation here is another matter. Some commentators report that the Quebec legislation is associated with statistically significant and quantitatively large increases in both strike incidence and duration and hence overall strike activity.[2]

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[2] Morley Gunderson, Angelo Melino and Frank Reid, The Effects of Canadian Labour Relations Legislation on Strike Incidence and Duration, 41 Labor L.J. 512, 517 (1990).

A leading text refers to Canada's "rather unenviable record of strikes, as compared with other western industrialized countries."[3]

It also is worth noting that the Canadian unemployment rate in recent years has generally been higher than that in the United States, sometimes half again as high as ours. Although there is no demonstrable connection between Canada's rate of unemployment and Canada's labor laws, the former provides no support for our copying the latter.

Indeed, if we were to undertake to copy Canadian labor law, the changes in our system would be profound. A basic difference is that neither Federal nor provincial legislation explicitly protects the fundamental freedom of choice of employees to refrain from engaging in strikes and other concerted activities that has been a cornerstone of American labor law for over forty years.

(8) Employees' loss of paychecks as a moderating influence on bargaining demands

It is often asserted that employees' loss of paychecks is a moderating influence on union bargaining demands, so that the risk of permanent replacement is not needed for this purpose. However, in tight labor markets, strikers, particularly those whose skills are in demand, may obtain other jobs during a strike, so that another paycheck replaces that which is lost. Employees who do not obtain other jobs often qualify for unemployment compensation or may receive union strike benefits. Strike-bound enterprises, on the other hand, are sometimes forced into bankruptcy.

CONCLUSION

The right of employees to choose to work, rather than to go out on strike, and the right of employers to offer permanency to employees who make that choice, are important aspects of the balance of interests reflected in American labor law today. S. 55 would upset that balance, with far reaching consequences for nonstriking employees, employers, and the consuming public. Such legislation is both unnecessary and unwise.

Diamond Walnut Growers Labor Dispute

BACKGROUND ON THE COOPERATIVE

Established in 1912, Diamond Walnut Growers is a California agricultural cooperative with a processing facility in Stockton. More than 2,000 growers are members, each of whom farm, on average, 36 acres of walnut groves.

Diamond members grow approximately 50 percent of the walnuts produced in the United States. Their walnuts are marketed in domestic and overseas markets. Of total production, approximately one-third is exported to foreign countries, primarily in Europe and Asia.

The Stockton facility employs about 300 regular, or year-round workers, and about 450 seasonal workers, during the September through October critical harvest season.

RELATIONSHIP BETWEEN DIAMOND WALNUT AND TEAMSTERS

In 1956, when Diamond began operating its Stockton processing facility, it voluntarily recognized Teamsters Local 601 as the union representative of its production and maintenance employees.

For the next 35 years Diamond and Local 601 had a good working relationship. The two parties successfully negotiated a series of 3-year Cooperative Bargaining Agreements.

Prior to the present labor dispute, the parties experienced only one 5-day strike. But because it did not occur during the critical harvest season, Diamond did not hire replacement employees.

SUCCESSFUL LABOR NEGOTIATIONS IN 1985 AND 1988

By the early 1980's, Diamond Walnut's wage and benefit structure far exceeded its competitors. But unfortunately during this time, the entire walnut industry was experiencing depressed prices. The market conditions forced Diamond to propose wage cuts during the 1985 negotiations. However, this did not prevent Diamond and local 601 from successfully negotiating an agreement which included significant

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[3] See H.W. Arthurs, et al, Labour Law & Industrial Relations in Canada ¶ 575 (3d ed. Kluwer 1988).

wage-rate reductions, but maintained Diamond's comprehensive and extensive benefit structure. Additionally as a result of these negotiations, Diamond provided substantial lump sum payments (up to $11,000 per individual) to employees affected by the wage-rate reductions.

However, even with the 1985 wage-rate reductions, Diamond remained the industry leader in employee compensation.

A Federal mediator from the Federal Mediation and Conciliation Service successfully intervened in the 1988 negotiations. The final agreement provided salary increases for employees and worker classification upgrades, which resulted in a 33 percent increase, on average, for regular Diamond employees' compensation over the next 3 years.

Again, even after the 1988 negotiations, Diamond paid higher wages and offered a better benefit package than its competitors.

1991 NEGOTIATIONS

By April 1991, Diamond and Local 601 began negotiating a new collective bargaining agreement because the current agreement was due to expire on June 30.

Concern about the lack of progress in the negotiations, Diamond requested the assistance of two experienced Federal mediators in an attempt to reach a new agreement. Diamond also appointed a nine-member bargaining committee, more than half of whom participated in the successful 1988 negotiations. The nine-member bargaining committee appointed by Local 601 was made up primarily of members who were new to negotiating such agreements.

Two Principal Issues Separated the Parties.

First, like most employers, Diamond had experienced rapidly escalating health care costs during the 1980's. To help offset them, Diamond proposed that employees pay approximately 9 percent of the cost of their health insurance. This translated into individuals paying $11 per month; complete family coverage was $33 per month. The union flatly rejected this proposal and stated that it would never agree to any health insurance copayment, no matter how small.

Second, Diamond proposed that employees participate in an incentive plan that involved basing a part of employees' compensation on Diamond's performance. In addition, Diamond proposed across-the-board increases in existing wage rates. Local 601 also flatly rejected this offer, stating that it would never agree to Diamond's proposed incentive plan.

By rejecting the plan, the teamsters walked away from $400,000 paid to employees (an average of $1,300 per person) who worked through the 1991 season.

On September 3,1991, the union leadership rejected Diamond's final contract which incorporated the suggestions of the Federal mediator and included wages and benefits which greatly exceeded those paid by all other walnut processors in the U.S. For example, wages paid by Diamond to skilled mechanics and forklift drivers exceeded their competitors' rates by an average of 30 percent.

Despite the company's urging, the union leaders refused to submit the final offer to a vote of regular union employees.

1991 STRIKE

Local 601 deliberately waited to strike until September 4, 1991—the beginning of the annual walnut harvest. As a perishable commodity, walnuts must be processed during this critical 2-month period or they will spoil.

Hiring replacement workers—machine operators, mechanics, quality control personnel, walnut graders and forklift drivers—was the only way Diamond could harvest its walnuts in 1991. Without them, Diamond and its more than 2,000 grower members and their families would have suffered disastrous financial losses which would have had a ripple effect throughout the Northern California economy.

These replacement workers risked their personal safety in crossing the picket line during the strike. Most experienced threats to themselves, their families and their property from the striking employees, and many suffered damage to their homes and cars.

In order to get skilled individuals to work under these difficult circumstances, Diamond offered the new hires "permanent replacement" status under the National Labor Relations Act (NLRB). Without this lawful measure of job security, there was no incentive for workers to take the jobs and come to work every day.

Hiring replacement workers proved essential as the union made no offer to end the strike throughout the entire 1991 walnut harvest season. That crop was the largest in history—in September and October, more than 2 million pounds of wal-

nuts were received each day at the Stockton facility. The replacement employees also successfully processed the 1992 walnut crop and continue to work for Diamond.

LOCAL 601 REQUESTS REPRESENTATION VOTE

In April 1992, Local 601 voluntarily requested the NLRB to conduct an election among all Diamond employees—strikers and workers—to determine whether the union would continue to represent the Diamond work force. The NLRB ordered a bifurcated election—striking employees voted on August 11, 1992 and working employees voted on October 8–9, 1992. Local 601 then challenged all but 10 of the 736 votes of working employees.

However, the NLRB recently ruled that the overwhelming majority of the challenged votes should be counted. The outcome of the vote should be announced shortly.

Additionally, Local 601 filed objections to the election. A hearing on the objections is scheduled to begin on March 31, 1993, and a decision is expected within 2 months. If the election is upheld, it will determine whether Local 601 still has standing to represent the Diamond work force.

STATUS OF NEGOTIATIONS

Despite the assistance of Federal mediators, the two parties have not made any progress toward a contract. Only two bargaining sessions have occurred since August 1992. The union has insisted that Diamond fire its replacement work force as a precondition to further bargaining. Diamond has rejected this demand.

Diamond has proposed to the union that both sides withdraw all legal actions against each other and allow the votes to be counted in the NLRB election. The union has refused this suggestion, and continues to challenge the election results through all available legal avenues.

PREPARED STATEMENT OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

The Associated General Contractors of America (AGC) is a national trade association of more than 32,000 firms, including 8,000 of America's leading general contracting firms, many of which operate with collective bargaining agreements, and many operate on an open-shop basis. They are engaged in the construction of the commercial buildings, shopping centers, factories, warehouses, highways, bridges, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multifamily housing projects and site preparation/utilities installation for housing development.

AGC appreciates the opportunity to provide this statement to the Senate Subcommittee on Labor, Committee on Labor and Human Resources on the issue of maintaining company operations during an economic strike. AGC requests that this statement be made a part of the record of the subcommittee's proceedings.

The legislation under consideration, S. 55, would impair a business's ability to to continue operations during a strike by amending Section 8(a) of the National Labor Relations Act to make it an unfair labor practice for an employer to hire permanent replacement workers during a strike, or to grant an employment preference who worked, or offered to work, during a strike.

AGC strongly opposes this legislation because: 1) it is unfair; 2) it would promote strikes; and 3) it would seriously impair the development of a high performance domestic economy need to compete globally.

By promoting strikes and impairing an employer's ability to maintain operations strike, S. 55 would:

Be a denial of basic freedom for the vast majority of the U.S. work force.

Radically alter the delicate balance in labor-management relations which has evolved over many years with respect to economic strikes.

Force an employer to shut down or sharply curtail operations during a strike.

Shift bargaining power to unions by forcing employers to accept unreasonable union demands to avoid the severe economic consequences of a shutdown caused by a strike.

Increase the number and frequency of strikes because union members would be assured of retaining their jobs.

Remove the rights of individual workers by prohibiting employers from retaining workers who exercise their right to work by freely electing to cross picket lines.

Endanger the job security of nonstriking employees who could lose their jobs or suffer reductions in pay or benefits as a consequence of a strike as layoffs or benefit reductions become necessary.

The National labor Relations Board (NLRB) and the courts have maintained a careful neutrality in disputes between management and labor since the 1930's. Current law provides that employers may attempt to continue operations by hiring replacements for strikers only when there is an economic strike. During lock-outs or unfair labor practice strikes, strikers enjoy the right of full reinstatement. The rights of employers and employees during economic strikes are therefore balanced to ensure fairness.

The leading decision addressing this issue was handed down by the U.S. Supreme Court in 1938 in *NLRB* v. *Mackay Radio and Telegraph Co.*, 302 U.S. 333 (1938). In that case, the Court held that an employer is not required to replace permanent striker replacements, provided that the employer has not violated the National Labor Relations Act (NLRA). This doctrine has been reaffirmed consistently by the NLRB and the courts.

Proponents of this legislation argue that the practice of hiring striker replacements me widespread, that the balance in collective bargaining has shifted in favor of employers, and that the replacement of striking workers is tantamount to firing employees for exercising their right to strike.

AGC submits that the hiring of striker replacements is not a widespread practice instruction industry. In fact, operations during a strike often are not feasible skilled temporary replacement workers are not always readily available. Construction employers who do hire striker replacements do so as a result of economic and project completion requirements, which are always made part of the contract project owner, rather than any alleged strategy to "break" a union. In the construction industry, where failure to meet completion deadlines often carries financial penalties, employers may have no choice but to hire new workers when their employees and refuse to work. The short construction season in many parts of the country also makes it essential that construction employers save the option of continuing to operations during a strike. It is the employer's right to choose to attempt to maintain operations during the course to an economic strike that this proposed legislation would deny.

In recent years, union membership has declined to little more than 15 percent of the entire U.S. work force. This legislative proposal is nothing less than an attempt to abuse legislative power to reverse a three-decade decline in union membership. This proposal mandates results that unions have been unable to achieve through the collective bargaining process. It runs counter to the principle of allowing employee free choice and abort market economic decisions.

AGC also believes that the proposed legislation introduces an unfair element into the existing balance of labor-management relations. An employer's right to operate strike by hiring striker replacements is one of the few mechanisms available to maintain an incentive for unions to resolve labor disputes. Without this essential option, unions would be granted controlling economic power, detrimental to even businesses and who are not affiliated with unions—as the economic dislocation caused by increased strike activity will have ripple effects throughout the economy.

Under current law, unions are frequently in a position to sustain an economic strike longer than an employer. This is particularly true in the construction industry, where project completion deadlines often carry financial penalties for the employer. If has no incentive to settle a labor dispute because its members' jobs are legislatively protected, but the employer and other employees are in severe jeopardy of financial penalties or job loss, a construction contractor will have no choice but to accede to the union's demands.

The proposed legislation is a "poison pill" for construction contractors who work without collective bargaining agreements and for the millions of workers they employ. By use of the term "labor dispute," the legislation could encompass any workplace dispute between a group of employees and management. A small group of employees could walk off the job with impunity to protest a new work schedule or the assignment of a new foreman to a crew. The construction contractor would be powerless to replace those employees—no matter how trivial the dispute.

In addition, any time such "strikers" should decide to return to work, they would have to be reinstated, and their replacements would have to be fired. This represents an unwarranted restriction on a construction contractor's right and ability to manage its work force. Moreover, the unfairness would be visited on workers as well, as the measure would result in the firing of workers who had exercised their right to work through a strike.

This ill-conceived grab for coercive economic power would facilitate the "salting" of an employer's work force with union organizers. This would put employers in the absurd position of having to rehire the very people who jeopardized the business and the economic security of those employees who want to continue to work through an economic strike.

AGC strongly opposes legislation prohibiting the hiring of striker replacements in the context of an economic strike. Current law adequately and fairly protects strikers in situations where their positions may be jeopardized by unfair labor practices. S. 55 would fundamentally alter the carefully crafted balance between labor and management which is essential to effective and fair collective bargaining—and economic balance in labor markets. AGC urges Congress to firmly reject S. 55.

Far from even considering striker replacement proposals, Congress should instead enact badly needed legislation to amend the Hobbs Act and thereby overrule the Enmons decision. This action would make organized jobsite violence, which too frequently occurs during labor disputes, a violation of Federal law. Collective bargaining decisions—by employers, unions, and workers—should be made on the basis of economic judgments—not fear and intimidation. AGC urges Congress to amend the Hobbs Act and thus protect workers and employers from violence or threats of violence and restore economic balance to labor markets.

Senator HATCH. Mr. Lesher, if S. 55 were enacted, would you anticipate the legislation would increase or reduce conflict in the workplace?

Mr. LESHER. There is absolutely no question that the conflicts would increase as well as the incidence of strikes. What this country does not need is more strikes.

Senator HATCH. How about you, Mr. Faris?

Mr. FARIS. I concur 100 percent. We are working toward cooperative relationships to listen to each other and to work together. We have made great progress in the eighties. Why in the world, after 55 years, do we want to change it?

Senator HATCH. How about you, Mr. Jasinowski?

Mr. JASINOWSKI. I concur with that, Senator Hatch, and would simply add that in the case of an analysis of the Canadian provinces which in fact used the permanent replacements, the analysis showed that that in fact did tend to increase strike activity and their duration. The study was conducted by professors Gunderson and Melino at the University of Toronto.

Senator HATCH. Fine. Now, as I understand it, what you seem to be saying is that the unions have a right to strike. The one weapon that management or the business can use, whether it is a large business or a small business that is unionized, is the threat that they can after a period of time hire permanent striker replacements. Is that wrong?

Mr. JASINOWSKI. No. That's exactly the position we have.

Senator HATCH. If we take away that right, where will business be? What kind of leverage will you have to resolve labor disputes that are of a significant nature?

Mr. JASINOWSKI. Well, I think to put it bluntly, Senator, it is unilateral disarmament in a case where you take away the one way in which employers can defend themselves against the excesses of a strike—not a strike, but the excesses of a strike.

Senator HATCH. You would agree, Mr. Lesher——

Mr. LESHER. Absolutely, and I would further point out that workers by and large have opted to stay out of unions in recent years. We are now down to less than 12 percent of the private sector work force which is represented by unions. So you are pitting that 12 percent against the 88 percent who choose not to join unions.

This legislation, if enacted, it is very clear the unions would like to have it enacted so that they could change that balance and begin to push people into joining unions.

Senator HATCH. Many people think that there is a delicate balance in labor-management relations that gives both sides kind of a coequal right to stand up for themselves. Unions have a right to strike, management or the business has a right to hire permanent replacements if they want to. If you take away that right, where will business be left?

Mr. LESHER. Well, the business community would be at the mercy of any group that wants to strike. You would not be able to save the business. You would not be able to stay open.

Senator HATCH. Because you'd have to cave in to whatever the demands are, right?

Mr. LESHER. Contrary to the notion that you can run it with the foremen and the managers, most businesses cannot be run that way. You have to hire replacement workers.

Senator HATCH. Can each of you tell me what percentage of strikers in any given year over the eighties which seems to be the criticized period—what percentage of strikers have been replaced by striker replacements?

Mr. LESHER. According to the National Labor Relations Board, it is something on the order of 4 percent, and less in the eighties than in the seventies, when it was about 4.5 percent.

Senator HATCH. Mr. Jasinowski, do you agree?

Mr. JASINOWSKI. I think those are the best numbers I know of.

Mr. FARIS. GAO studies of 1985 and 1989 both say 4 percent of all strikers were replaced in 1985, and 3 percent in 1989. That's according to GAO studies.

Senator HATCH. So between 96 and 97 percent of all workers are not affected by whether you change the law or not.

Mr. LESHER. And fewer each year.

Senator HATCH. And fewer each year.

Mr. Jasinowski, you represent some fairly large companies, and so do you, Mr. Lesher. Do large unionized companies really want to exercise their rights to hire permanent replacements?

Mr. JASINOWSKI. No. I think that——

Senator HATCH. Tell me why they don't, because Senator Metzenbaum seems to think this is an untoward or excessive right in businesses, and so does Professor Reich, the Secretary of Labor.

Mr. JASINOWSKI. Well, what is ironic, Senator, is that Secretary Reich has put, appropriately, the emphasis on increased cooperation, and I think that the large and small companies all feel that our future has to do more with empowering workers, improving teamwork, and not resorting to conflict.

So we want the same objectives. It is that we believe that that can happen by onsite cooperation between labor and management in each particular company and not through a Federal law. And frankly, I continue not to understand how Secretary Reich could omit this issue from that major commission that is going forward on cooperation.

So I think the large and small companies want cooperation between labor and management. We want to avoid strikes. We cer-

tainly don't want to use permanent replacements unless we have to.

Senator HATCH. Mr. Lesher, is that true of your companies, large and small?

Mr. LESHER. Yes. I very much agree with that. The last thing that any company wants is a strike, and the only thing worse than a strike is a long strike. No one wins in a strike. This legislation would guarantee that this country would experience many more strikes in the future.

Senator HATCH. And they'd be many more longer strikes.

Mr. LESHER. And many more longer strikes.

Senator HATCH. And if the businesses don't have this right to hire permanent replacements to save their businesses, what do they do? They either cave in to whatever the demands are, or they go out of business; is that right, or is there some other alternative?

Mr. LESHER. Indeed, and I would suggest that we can hear thousands of case histories of workers with difficulties, and you do have to empathize with them, as with the witnesses earlier. But we need to tell both sides of the story. We need to bring the corporate people in in those cases and look at that. The fact is that tens of thousands of companies went out of business last year because of bankruptcy. Many American companies are struggling to hold on because of health care costs and the over-regulation imposed by the United States Government.

The fact of the matter is what we want is to grow employment, not to see more unemployment. This legislation would virtually guarantee more unemployment by forcing businesses out of business.

Senator HATCH. Mr. Faris, would you care to comment?

Mr. FARIS. I would say, Senator Hatch, that if S. 55 is passed into law, I want to be sure that we draw the line and understand that in future years, when we see more and more small businesses collapse and we see a diminution of new businesses starting—right now, there are approximately 500,000 new businesses starting every year—why would I want to start a new business, why would I want to go into business, when the future of my business is totally out of my control?

I think it will hurt jobs more than any other piece of legislation that we have seen lately. It will be disastrous to small business. If it passes, watch it; keep the records; it will be disastrous. I hope it doesn't pass.

Senator HATCH. Do you agree with Mr. Lesher that this is a bill that will enable and encourage labor unions, which currently represent around 12 or 13 percent of the total working population, to unionize a much larger percentage of the workplace?

Mr. FARIS. Yes, Senator, it seems that's what this bill is. The beneficiaries of this bill seem to be the people who run the unions, who have the pension accounts at the unions—not the working men and women of America who are the ones who carry the load every day. They are the ones that are hurt by strikes. Everybody hurts by strikes, Senator, and we feel this will impose more strikes and longer strikes and be such a threat that why should a business want to grow the business.

Senator HATCH. There is a very good point. They keep raising the PATCO strike. Is that a good illustration?

Mr. JASINOWSKI. No, Senator, it is not.

Senator HATCH. Why isn't it a good illustration? Those people lost their jobs.

Mr. JASINOWSKI. Well, I think first of all, they were violating the law, as you know, with respect to going out on strike, and so it is not an analogous situation.

Senator HATCH. In other words, they were Federal employees who were bound by a law that says you cannot go on strike because you have these guaranteed protected jobs as Federal employees; is that correct?

Mr. JASINOWSKI. Exactly, Senator.

Senator HATCH. So when they went out on strike, they deliberately violated the law; is that right?

Mr. JASINOWSKI. That's correct, and I think it is not a good example for that reason. Beyond that, I think these few examples that can be raised do not offset the overwhelming dozens, virtually hundreds of companies, for which this does not apply.

Senator HATCH. Mr. Lesher.

Mr. LESHER. Senator Hatch, I would like to add that President Reagan was not the only public official who upheld his responsibilities by firing illegal strikers. The PATCO strike was clearly illegal. But mayors across this country of both parties have fired strikers who walked out illegally. Government employees have an obligation to the public to provide a service which is very important and critical in most instances, and that is the reason why they are not allowed to strike.

Senator HATCH. I have one last question, and if all three of you would care to comment. I note that the commission created by Secretary Reich has only one of its ten members from business. That individual happens to be from a large corporation, certainly not from the companies that you represent, Mr. Faris. Do you feel that it would have been important to also include other representatives of business and especially of small business—if you want to get to a situation where you can resolve labor conflicts?

Mr. FARIS. Obviously, Senator. When the Secretary of Labor goes to south Florida to meet with the leadership of the large unions, but yet will not give an appointment to the vice president of Federal Government relations of the Nation's largest small business advocacy group, he is listening to one side of the story as if his mind were already made up.

We think that that is the real tragedy, that we are not listening, we are not looking. With all due respect to Secretary Reich's background, as he said earlier, he is used to 40-minute segments teaching in the classroom. The classroom is not what this is about. Theory is not what it is about. It is the reality of daily living for small business owners who are struggling to survive right now. We do not need another piece of legislation like this. And this committee of ten with only one from business, and that representing large business, is just an indicator.

Senator HATCH. Mr. Jasinowski.

Mr. JASINOWSKI. I have to——

Senator METZENBAUM. No. Just a moment. I'm going to have to cut you off.

Senator HATCH. Well, I want all three to answer the question.

Senator METZENBAUM. No. Just a moment, Senator Hatch. You have tried each time—Senator Jeffords has a right to be heard, and your 10 minutes——

Senator HATCH. And I will stay here and listen to him.

Senator METZENBAUM. But your 10 minutes has expired.

Senator HATCH. Well, let them answer the question. I want all three of them—you have small business, big business and all business. And I'd like to hear what they have to say about it.

Senator METZENBAUM. I'm sure you are going to have some great gems of wisdom that are going to be a total surprise to us, Mr. Jasinowski, and I am so excited——

Senator HATCH. We have had three witnesses out of this whole hearing.

Senator METZENBAUM. —I am so excited to hear it, and I know it will be something new for the record. I wouldn't want to deny you that opportunity.

Senator HATCH. Well, that's really wonderful. We knew that you would be just in the end.

Senator JEFFORDS. And I will yield 2 minutes of my time.

Senator METZENBAUM. No, you don't need to do that, Senator Jeffords. We go out of our way for Senator Hatch always, and once more will be okay.

Senator HATCH. Well, I am glad to hear that precedent, and I will expect it to be followed from here on in—because I always gave the extra time when I was chairman.

Mr. JASINOWSKI. Senator Metzenbaum, I think I am going to surprise you. First of all, I would give Secretary Reich credit for having reached out to a substantial amount of the business community, including ourselves, and I think Paul Alare and the Secretary of Commerce and others who have been added to the commission have been there in part because of our suggestion that it needed more business leadership on it.

Having said that, it has no small business participation, and I would think that that would be a way to improve it, and I think that in the public hearings it is important for the commission to address the small business issue as a part of the deliberations.

Senator METZENBAUM. Thank you very much.

I should point out so the record is clear that there is only one person on the commission from labor, and that is Doug Fraser, former president of the UAW. There are four academics; three former Secretaries of Labor, one of whom was in a Republican administration; one former Secretary of Commerce, and the president of Xerox Corp.

Senator HATCH. All slanted toward labor, every one of them.

Senator METZENBAUM. I think all of these people, including those from Republican administrations, and the chief executive of Xerox, make the grade.

Senator Jeffords.

Senator HATCH. Mr. Lesher hasn't answered.

Mr. LESHER. If I could just add one quick footnote, Senator Hatch, we appreciate your leadership on this issue and so many

other issues. The question you asked earlier about the commission is pertinent—of what value is that commission if it is unwilling to step back and defer for a year changing a law that has been on the books for 55 years? If that commission is not going to look at this before it makes a recommendation, then I question the value of the commission itself.

Senator HATCH. My point is nobody represents 87 percent of the rest of the work force. That's the point. You've got one, solid person representing 13 percent and a number who are slanted toward labor and nobody representing small business—and I think that's what you are griping about, isn't it, Mr. Faris?

Mr. FARIS. Absolutely, Senator.

Senator METZENBAUM. Senator Jeffords.

Senator JEFFORDS. Do you want to comment, Mr. Faris?

Mr. FARIS. Absolutely.

Senator JEFFORDS. Go right ahead.

Mr. FARIS. That's my comment.

Senator JEFFORDS. OK. First of all, I agree that the commission should be considering the impacts of the striker replacement issue. But I would like to turn my attention to finding some answers to the causes for why we have had some of the strikes recently.

From listening to the witnesses this morning, it seems that the major problem is concessionary-type bargaining mainly over benefits and mainly over health care. Is that your understanding from your own familiarity?

Mr. JASINOWSKI. I think that's correct. We have done analyses of health care, Senator, and we find that the increase in health care costs are shifted almost entirely back to labor. What firms do is they reduce the headcount because they can't keep up with health care premiums that are three times the rate of inflation.

I think the slow economy, the slowdown in global growth and the fact that our growth rate has been about a third of what it has been historically is the second reason why we have had as much downsizing as we have had.

Senator JEFFORDS. With respect to health care again, it also is pretty much of a greater burden on those small businesses that have relatively low-wage people; is that correct?

Mr. FARIS. Yes, sir. If I have five employees, and they make approximately $15,000 each, and I make around $25,000 to $30,000, and I am mandated that I have to pay health care costs of $3,000, $4,000, $5,000 each, it doesn't take long with arithmetic to figure out that I am going to have to have at least one less employee to get the same job done. And that one employee then goes on unemployment compensation and possibly gets a job with the government that is paid for by my taxes.

So what happens is the price of the product and the service goes up, the consumer has less money, and we lose in the worldwide economy. It is devastating to small business, especially mandating that small business has to provide health care, especially the mandate.

Senator JEFFORDS. Mr. Lesher.

Mr. LESHER. Health care costs are clearly the most rapidly rising costs facing all of business. For small business, in addition to the cost, you have the availability. One of the things that we are rec-

ommending is risk-pooling to make sure that health care insurance is available to the small companies.

Senator JEFFORDS. With respect to health care again, in my State, the average percentage of payroll to cover health care is somewhere around 11, 12 percent. Is that what your experience is true around the rest of the country?

Mr. JASINOWSKI. You are saying that the total health care premiums costs are 11 to 12 percent of payroll?

Senator JEFFORDS. Yes.

Mr. JASINOWSKI. I think that's correct, Senator, as far as we know at the National Association of Manufacturers. That's about what it is for us, maybe a little less in some cases.

Senator JEFFORDS. I have been working on a plan which I'll be glad to send you, which is trying to get these costs down so that the impact on small business in particular would be acceptable. We did some examination and found that if we took all of the money being spent in the private sector now, that you could fund that with about a 6 percent—if everybody kicked in evenly; there has been so much cost-shifting to those that have insurance—if you had an even premium of 6 percent of payroll, would that be advantageous over the present situation, especially for small business, where they had to pay a percentage of payroll rather than purchase a plan?

Mr. JASINOWSKI. I think the numbers sound right, but I don't quite understand where it is being financed from. In other words, you are saying you would squeeze down the inefficiencies in the system to save a certain amount, and that it brings you down from 11 percent to 6 percent?

Senator JEFFORDS. No. It comes about because there is so much cost-shifting that apparently double the burden is being carried by those who are paying than would be if everybody was paying. And I'll share those with you because I think it is an interesting piece of evidence that has not really been looked at, but it gives us some very interesting ways to try and get the costs under control and at the same time be able to provide the universal coverage which people desire.

Mr. LESHER. If I could just say that cost-shifting comes about for two reasons—one, when you try to cap the costs to the public sector, then those costs get shifted to the private sector. The other place where you get cost-shifting is from those 35 million Americans who are not covered. So when you begin to cover them, it is very difficult to see how your numbers come out at 6 percent.

The one thing we know for sure is that a government-operated program is always a lot more expensive than a private health care system. What we would like to see is the continuation of that private system by changing a lot of the things that drive the costs of health care.

Mr. JASINOWSKI. Having said that—and I agree with Mr. Lesher—I think we certainly support moving to comprehensive health care, which is part of the premise of your point, Senator, as a way to reduce cost-shifting. There still is the issue of where you get the money from in order to cover the people who are not covered now. But by moving to comprehensive health care, you would reduce the cost-shifting, and you could reduce the premiums.

Senator JEFFORDS. I will share that with you. I don't want to go into it now; it would take too long to do that. But it does seem to me that if we can get rid of the pressures now on business in the health care area, that a lot of the pressures that may lead to replacement worker situations—because I think it is also true that a younger, more healthy work force is less expensive to provide health care for than older workers, and that is a very bad tendency that I see in this country, and it is also a bad tendency with respect to getting businesses to be able to continue pension plans. So I think we are dealing with some very serious issues here which I think are much more important than trying to replace a law which has been in effect for 50 years and has worked pretty well.

Mr. FARIS. Senator, if I might, part of the health care in small business is for the health of the business itself, so that there can be jobs, and individuals can buy the necessities of life and have a quality of life. But I am reminded of one of my Tennessee stories about how you boil a frog, Senator. You never throw a frog in hot, boiling water. The frog jumps out—it knows better. It identifies it for what it is. You put the frog in nice, lukewarm water, and the frog feels comfortable. And then you just turn the temperature up a little bit at a time, until finally, the frog realizes it is too hot in here, and then the frog is too weak to get out.

S. 55 is a major turn-up of the temperature of the water that small business finds itself in today, and we are saying it is time to stop. That's enough. We don't need to wait until we are so weak that we can't survive. That's the health care that I am most concerned about—keeping the businesses and the jobs alive.

Senator JEFFORDS. That's a good point, and with that, I'll conclude my questions.

Thank you, Mr. Chairman.

Senator METZENBAUM. With that, we'll conclude this hearing, but I just want to correct one statement that has been made by Senator Hatch as well as one of the witnesses.

With respect to the 4 percent that the GAO used, the GAO found that employers hired permanent replacements in 17 percent of the strikes and permanently replaced 4 percent of the striking workers. So that permanent replacements were hired in far more than just 4 percent of the cases. And furthermore, the mere threat of permanent replacements, there is no question about it, has had a permanent chilling effect on the willingness of employees to go on strike.

Now, I want to say something in response to my friend Dick Lesher. You said that passage of this legislation virtually guarantees more unemployment by forcing more and more businesses out of business. And I want strike a bell for the capacity of American business to compete on a worldwide basis, because our major competitors already ban striker replacements, and they are not suffering by reason of it. Japan, Germany, France, Belgium, Canada—five provinces—Greece, Italy, the Netherlands, Sweden, they all ban striker replacements. Great Britain is one place that allows striker replacements in some circumstances. But those countries are competing very effectively with us, too effectively in some instances, and they are not suffering. Small business isn't suffering. Manufacturing isn't suffering.

And I would just say to you that I am not willing to sit here and concede to you, representatives of major corporations of America, that American corporations cannot do it as well as foreign corporations. Others are doing it in other countries; I think you can do it as well, and that's the reason——

Mr. LESHER. May I respond, Senator Metzenbaum?

Senator METZENBAUM. Sure.

Mr. LESHER. You may be interested to know that in Japan, which is one of the countries we compete with the most, that the average strike lasts a total of two hours. So there is hardly any time to hire either temporary or permanent replacements, or any need for it. So comparing apples and oranges really doesn't give us much in the way of lessons for America.

Senator METZENBAUM. How do you account for them lasting only two hours? Is that because employers capitulate, or is it because the unions drop the strike? How does that happen? I think it's a great idea.

Mr. LESHER. I don't know, but it's an interesting statistic, isn't it?

Mr. FARIS. They negotiate for 3 years. That is very standard in Japan. After they have had a contract signed, there is 1 year where nothing happens, and then they start negotiating, and they negotiate for 3 years.

I think the point about the other countries is they do not have our industrial policy, period. They use a different system. So you are asking to change a rule in a baseball game when they are playing soccer.

Senator METZENBAUM. What do you mean—Germany and Canada and France use a different system?

Mr. FARIS. Yes, sir. For instance, in Germany, the system says that if there is even a threat of intimidation by strikers, it becomes an illegal strike. Do we want to pass that today, Senator?

Senator METZENBAUM. No, we don't want to do that. I am not prepared to accept your representation on that.

Mr. FARIS. Well, those are facts.

Senator METZENBAUM. I am not certain that is the law in Germany.

Mr. JASINOWSKI. Mr. Chairman, if I could just reinforce that, there are restrictions on the ability to strike in most of those industrialized countries, which there is not within the United States. So they have a different aspect on the other side of the balance, and I think that that is a major reason why they ban permanent replacements. The strike's strength is much greater in industrialized countries.

Senator METZENBAUM. Thank you very much. Unless somebody has something further——

Senator HATCH. If I could just say one other thing.

Senator METZENBAUM. Sure.

Senator HATCH. In all of those countries, they have a different system of labor laws. In Japan, the government controls, and they are not going to let anybody get away with a strike; they can't afford to. In our country, we give our people the right to strike so they can stand up and do what they feel is right. But we also balance that by saying there is a limit; we aren't going to just let you

break the business. And if the business needs to save itself, then they can hire permanent replacements.

And to talk in terms of hiring temporary replacements, there is hardly a business of any size in the world that can survive doing that. Now, there may be some businesses that might survive a short period, but that's not what we're talking about here.

So this is, like you say, apples and oranges. And I want to personally compliment all three of you for your testimony here today. I think it has been very enlightening. And I want to thank everybody who has testified today.

This is a big bill. This is a big change. This is something that could change our whole way of life if we allow it to occur the way it is currently written. And I think you've made a pretty good case why we should not allow it to occur.

Senator METZENBAUM. Thank you very much for meeting with us. We are always happy to hear your comments. We look forward to working with you.

[Additional material follows:]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF WILLIAM A. STONE

My name is William A. Stone. I am president of Louisville Plate Glass Co. in Louisville, KY. We are the majority stockholder in two (2) Atlanta glass manufacturing firms, Tempered Glass Inc. and Insulating Glass of Georgia. I am also a member of the Board of Directors of the United States Chamber of Commerce and serves as Chairman of its Labor Relations Committee.

In 1977 our company, which employed approximately 25 workers, was shocked when our union presented us with economic demands that would double our labor cost over 3 years. We either had to negotiate hard or face extinction. We took a strike and had no alternative to replacing the strikers. I should emphasize that, like most employers, we were reluctant to take this step. Experienced employees are a company's greatest asset. Replacing them is always a last resort. Some of our original employees crossed the picket line. We replaced the remaining strikers, but continued to negotiate with the union. Eventually, the union and Louisville Plate Glass Co. reached an impasse.

The net result is that today our organization has three manufacturing units of over 100 employees. Our sales are 6 to 7 times greater than when we received the union's excessive demands. If the striker replacement bill (S. 55) had been in effect, not only would none of our companies exist, but there would 100 families without jobs.

Another example occurred in Cincinnati, Ohio, about 3 years ago when there were approximately 20 small glazing contractors. These were family-owned businesses averaging about 10–12 employees each. The labor union at the time came up with an ludicrous demand of almost an 80 percent increase in economic costs. This was at a time of severe and serious competition, a shrinking market, and subsequent declining prices and profits. Most of these companies had no alternative but to take a strike and hire permanent replacements.

Today, without exception, they are all in business and, despite the horrible economic outlook for the commercial construction industry, are surviving. These 20 companies have approximately 300 employees including laborers, telephone operators, sales people, clerks, accountants and office personnel. None of these people would be working in the industry today if the striker replacement ban were in place. If the union succeeded, these small companies would have been crushed, and one major national firm would have entered the Cincinnati market, dominated the glass construction industry, raised prices and caused an inflationary spiral. This would be the realistic result of striker replacement legislation on one relatively small industry.

To show you how ridiculous the striker replacement law would be, just recently the Orthodox Jewish Home for the Aged in Cincinnati, OH, was faced with a strike. Already the nursing home paid a more than competitive wage in the Cincinnati market. Obviously, if the employees engaged in a strike, it would endanger the very existence of the patients in the home. Seventy percent of the home's residents are on medicaid. This is a charity operation. Despite all of this, there was a strike. It is still going on. To illustrate the union's attitude, some of the striking workers threw pork tips in the lobby of the Orthodox Synagogue nearby, desecrating this religious edifice. The lowest paid employees have been offered a 12-percent increase, and the highest paid a 4 percent raise. This was extremely generous given current economic conditions. The nursing home is operating with permanent replacements.

In a letter from Senator Howard Metzenbaum to Mr. Mark Moskowitz, a member of the Board of the Orthodox Jewish Home for the Aged, he said, "I am mindful of your concerns regarding this situation at the Orthodox Jewish Home for the Aged. However, in the case of an economic strike, a nursing home employer can address these concerns through the hiring of temporary personnel, the operation of the business with management personnel, or by negotiating a 'no-strike' clause in the collective bargaining agreement." In the same letter, Senator Metzenbaum said, Employers have a number of lawful options in responding to a strike, including to cease operations . . . I believe strongly that it is immoral and contrary to sound public policy for any employer to hire or to threaten to hire permanent replacements for employees who are engaged in a lawful strike."

The Senator, in my view, demonstrated a misplaced sense of judgment when he characterized as "immoral" a concern for the health and safety of the impaired nursing home patients over the demands of the strikers. A copy of his letter is attached.

Had striker replacement been in effect, the nursing home probably would not have been able to serve its patients, and many small employers within Senator Metzenbaum's State of Ohio would not exist. Further, I certainly would not be rep-

resenting an organization of more than 100 employees. Rather, we probably would be long gone, and our market would be facing higher prices from dominant large international companies who are now forced to compete with small hard-hitting organizations such as ours.

In all my years of involvement in public policy, I have always been able to see that, no matter how critical an issue, the other side had legitimate points. Even though I felt that in most cases, the evidence was overwhelming on the side of the position I took, I always saw that there was, from the other guy's point of view, some degree of reasonableness in his position. Striker replacement is the most singularly, intellectually dishonest, and one-sided proposal I've ever seen.

The Senate would laugh me out the door if I asked for a law giving our companies the exclusive right to sell our products in the States in which we operate. The economic ramifications are obvious and it would be insulting to even request such a bonanza. However, organized labor is asking for an exclusive franchise to terrorize employers, large and small, all over this country.

We have a vivid example in our community of why such a law is totally unnecessary. In Louisville there is a firm called Fischer Packing Co. that has had a great deal of labor strife. They permanently replaced the strikers. During the presidential campaign, when candidate Clinton visited Louisville, he called that strike an example of why he favors striker replacement legislation. However, the union in this case filed a NLRB unfair labor practice against Fischer Packing. The NLRB determined that Fischer Packing committed an unfair labor practice and, under current law, was not permitted to permanently replace its strikers. If a company bargains in bad faith, it cannot permanently replace its strikers. Here we had an example of the perfect balance in labor law operating in the public interest. A company was found in violation of the rules, and thus did not have the option of permanently replacing strikers.

No issue is as firm in the minds of the members of the U.S. Chamber of Commerce as Striker Replacement. The #1 priority of our membership is to make sure it doesn't become law.

Congress should stop thinking of labor negotiations as those that exist between the UAW and Caterpillar. Most labor disputes are between small family-owned businesses and local unions who are supported by massive internationals. The vast majority of labor negotiations are already unfair contests, with the employer as the little guy, and the union as the big guy. Pass a ban on replacing strikers and you will see more manufacturers move out of this country, if it is logistically possible to do so.

There can be no compromise on this issue. Congress must tell organized labor that this is one gift they cannot have. Striker replacement legislation must permanently be kept off of the public agenda.

PREPARED STATEMENT OF THE NATIONAL COAL ASSOCIATION

Mr. Chairman and members of the subcommittee, the National Coal Association (NCA) respectfully presents our position for the hearing record on S. 55, which amends the National Labor Relations Act and the Railway Labor Act to prohibit employers from hiring permanent replacement workers during labor disputes. NCA opposes S. 55 because it would irreparably damage the fragile balance of power which has existed between labor and management for over 50 years.

NCA represents the interests of the vast majority of our Nation's coal producers who are responsible for the production of approximately 70 percent of our domestic coal resources from both surface and underground, and union and nonunion mines located in 26 States. Additionally, equipment manufacturers, resource developers, utilities, and transporters, all of whom rely on the uninterrupted production and supply of coal, are also members of NCR.

The NCA is unified with all other segments of the business community in its opposition to S. 55. While our objections mirror those espoused by others we believe coal's unique location, production and marketing chain described in this statement could suffer tremendous interruptions should S. 55 become law.

COAL INDUSTRY'S PRODUCTION AND MARKETING CHAIN

To fully understand our unique situation, one must first understand and recognize the coal industry's geologic locations, long-term financing and marketing means. The coal industry remains one of our Nation's most highly competitive industries. In 1992, just under 1 billion tons of coal were produced from approximately 3,000 active mines employing an estimated 125,000 miners. Of this amount, exports totaled

102 million tons contributing 4.3 billion to the positive side of our balance of trade. The remaining 900 million tons were supplied to domestic utility and industrial users and were responsible for the generation of 56 percent of domestic electricity.

Coal reserves, sufficient to justify commercial operations, have been identified in 26 States. Indeed, in many regions, entire communities have evolved and exist based in large portion, if not entirely, on the continued viability and marketability of the coal produced from mines adjoining the community. The rural nature of these communities results in coal operators becoming the dominant employer, and, as such, these operators are often the only source of economic stability and growth.

The impact of this was illustrated by professors Richard Gordon and Adam Rose of The Pennsylvania State University who conducted a study on the economic impact of the coal industry on the U.S. economy. This study concluded that each coal miner supports seven additional jobs in the larger economy. Further, while coal production has a value of $21 billion, the coal industry's purchases from other sectors is responsible for $81 billion of production in the U.S. economy.

Because of the extreme capital intensive and competitive nature of the coal industry, the ability to compete both domestically and internationally is predicated on the ability to remain highly reliable, low cost producers. Before the first shovel of dirt is turned and before financial institutions will commit the millions of dollars necessary to develop new mines or expand on-going operations, the coal industry must prove its ability to mine, move, and market its product in an uninterrupted fashion. These same conditions are placed upon us by our customers who purchase in excess of 75 percent of coal under long-term supply agreements. These contracts, which often span 10 years or more, in duration, contain significant penalties for failure to conform to the terms of the sales contract. This system of checks and balances has enabled the industry to remain competitive and productivity gains have enabled coal prices to decline in real terms over several decades. At the same time, improvements in mine safety and environmental concerns continue to be addressed.

One of the principal underpinnings of this market success has been the generally stable labor relations environment which has existed in the coal industry during the last decade. As labor/management relations have moved from "confrontation" to "cooperation", we have seen a resulting commitment from purchasers to rely upon coal as a stable, long-term choice.

The pending legislation would seriously undermine the ability to meet contractual commitments should our companies be prohibited from hiring permanent replacement workers if economic strikes occur.

It is true that temporary replacement workers can be hired during a labor dispute which would enable coal companies to fulfill commitments. Coal miners are the most extensively trained and skilled in the work force today. The regulated environment within which our companies operate mandates that miners, for their own safety and the safety of others, receive initial, refresher and task training when required. This training is an integral component in the operation of safe, productive coal mines. However, it is highly unlikely that temporary replacement workers would share the same commitment to safety which must be an everyday focus. Violations of the Mine Act and regulations are not only hazardous, but can be extremely costly to any company. Of equal concern is whether companies would be able to provide sufficient inducement in rural communities to attract skilled employees from outside that area if prohibited from offering permanent employment status. Often such decisions require the uprooting of families. Assurance of permanent employment status is a condition precedent in such a decision making process. The prohibition from offering permanent status may well deter skilled, unemployed individuals from accepting employment. Additionally, the close knit nature of these small rural communities encourages negative sentiment on the hiring of temporary replacements.

CONCLUSION

Federal law currently provides each party in an economic dispute certain rights and remedies. Employees are provided the right to strike and withhold their services. Employers on the other hand, are provided the right to hire permanent replacement workers to continue operating. It is these basic rights which we seek to protect as currently defined in the National Labor Relations Act and codified in the *Mackay* doctrine. We fail to understand what incentive a union would have to come to the negotiation table, in good faith, if S. 55 were to be come law.

We believe enactment of S. 55 would undermine the ability to enter into and guarantee compliance with long-term contracts. Unlike airline or bus transportation companies, the coal industry's future is dependent on its ability to enter into long-term commitments. S. 55 jeopardizes that ability and the ability of our Nation to

continue to count on coal as a reliable low cost fuel source for the supply of electricity to our Nation's homes and industries and markets abroad.

INDEPENDENT BAKERS ASSOCIATION

P.O. Box 3731 • Washington, D.C. 20007 • (202) 333-8190

April 14, 1993

The Honorable Dave Durenberger
United States Senate
154 Russell Office Building
Washington, DC 20510-2301

Dear Senator Durenberger:

On behalf of the Independent Bakers Association we urge your opposition to H.R. 5, the striker replacement bill. We are a national association of over 350 independent wholesale bakers and allied industries. Most of our bakeries are family-owned and collectively produce 50% of the nation's wholesale baked goods.

As you are aware, H.R. 5 would amend the fifty-five year old National Labor Relations Act by prohibiting employers from hiring replacement workers during economic strikes. That Act has furthered years of stable, fair national labor law and policy. H.R. 5 will undoubtedly upset this carefully nurtured relationship between labor and management and will bring this country back to the days of labor unrest.

The impact of H.R. 5 on employers and unionized and non-unionized American working men and women would be immediate and direct. It would increase the possibility of strikes, disrupt operations of all firms, and especially hurt small businesses dependent on operations of other companies who are experiencing strikes.

We urge you to keep the current law intact and vote "no" on legislation that is not conducive to economic recovery and the growth of our nation's businesses. We request that you include this statement in the extended remarks of the Committee record.

Sincerely,

Andy Barowsky
Chairman
Independent Bakers Association

STATEMENT OF JOHN S. IRVING

THE PROBLEM

Friends of organized labor in Congress have introduced legislation that would prohibit private employers from hiring permanent striker replacements during economic strikes. The House Bill, H.R. 5, was introduced by then House Labor-Management Subcommittee Chairman William Clay on January 3, 1991 and has more than 200 House co-sponsors. The Senate Bill, S. 55, was introduced by Senate Labor Subcommittee Chairman Howard Metzenbaum on January 3, 1991 with at least 26 Senate co-sponsors.

This legislation would upset the fundamental economic balance Congress struck between labor and management when it passed the National Labor Relations Act (Wagner Act) in 1935. The new balance would clearly tilt the playing field to organized labor's advantage.

Labor leaders have made passage of the permanent replacement ban a top priority on their legislative agenda. AFL-CIO President Lane Kirkland has called the legislation a "burning issue." International Association of Machinists President George Kourpias has gone further and threatened not to donate a penny or provide a single minute of volunteer

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* The author is a partner in the law firm of Kirkland & Ellis in Washington, D.C. He served a four-year term as General Counsel of the National Labor Relations Board (1975-79) and represented the U.S. Chamber of Commerce on March 6, 1991, at hearings on striker replacements before the House Subcommittee on Labor. He is also a member of the Human Resources Council of the National Association of Manufacturers and NAM's Labor Employment Law Advisory Committee.

work for any candidate who refuses to vote for this legislation. Teamsters President William McCarthy has stated that the Teamsters will also withhold financial support from legislators who do not support these bills.

Clearly, a major legislative confrontation between labor and management is underway. The Bush Administration opposes these bills. Testifying before the House Subcommittee on Labor-Management Relations on March 6, 1991, Secretary of Labor Lynn Martin expressed the Administration's opposition and threatened a presidential veto if Congress approves the measure.

Management forces are mobilizing: The U.S. Chamber of Commerce and the National Association of Manufacturers staunchly oppose the legislation, along with their coalition of employers called The Alliance to Keep America Working.

It is important to understand what is at stake and why the outcome of this legislative battle is so important to employers. Both non-union and unionized employers should be concerned, even if they do not now anticipate a need to replace strikers. All private employers must be concerned because this change, given such high priority by organized labor, would fundamentally alter the labor-management balance that affects all of them, a balance that has existed for more than half a century.

BACKGROUND

In order to appreciate the significance of the striker replacement ban sought by organized labor, it is necessary to understand the fundamental balance struck by Congress in 1935 when it enacted the NLRA. That Act, as it states, was Congress' means of "restoring equality of bargaining power between employers and employees."

The NLRA guaranteed employees the right to engage in union and concerted activities and, if they chose, to be represented by a union in collective bargaining with their employer over wages, hours and the terms and conditions of their employment. Government's role as Congress saw it was to provide procedures to bring parties to the bargaining table. Once there, however, government's role was not to interfere, but to allow parties to negotiate solutions to their own workplace problems.

Government, as the Supreme Court has said, was not to dictate or supply contract terms for private parties. H.R. Porter v. N.L.R.B., 397 U.S. 99 (1970).

The NLRA guaranteed employees the right to strike to enforce their bargaining demands, i.e., to engage in "economic" strikes. Employers, on the other hand, were free to operate their businesses as best they could during a strike. To do this, a struck employer who had not violated the NLRA by committing unfair labor practices could hire temporary or permanent replacements for strikers. Just three years after passage of the NLRA, the Supreme Court confirmed this employer right to hire temporary or permanent replacements during an economic strike. In N.L.R.B. v. Mackay Radio & Telegraph, 304 U.S. 333, 345 (1938), the Court stated:

> Although § 13 [of the NLRA] provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

Economic weaponry, and risk, are critical elements of our national labor policy -- the right of workers to strike to enforce their bargaining demands and the right of employers to operate their struck businesses with temporary or permanent striker replacements. Risks were intended by Congress for employers and employees who could not resolve their differences through negotiations. The jobs of strikers were to be at risk if their employer's business failed or if permanent replacements were hired, and the employer's business was at risk if he could not successfully operate during a strike. These risks were intended by Congress as part of the dynamics of bargaining. They had the inherent tendency to drive negotiating parties closer together, toward agreement, not further apart.

As the body of law under the NLRA developed, the full scope of lawful economic weaponry was refined. Employer's can enforce their bargaining demands with lockouts. Employees can engage in selective, or "whipsaw," strikes against employers who band together in multi-employer bargaining. In turn, those same employers may selectively lockout their employees. Permanently replaced strikers are entitled to preferential rehiring as their former positions or positions for which they are qualified become vacant. Replaced strikers are entitled to immediate reinstatement at the end of a strike if the National labor Relations Board determines that the strike was caused by their employer's unfair labor practices.

However, the essential elements of risk remain the same. The prospects of a strike for employers and permanent replacement for economic strikers, and the potential impact of the economic weapons available to disputants, drive parties closer together and facilitate collective bargaining. When, as now, organized labor and its advocates in Congress seek to upset the fundamental balance struck by Congress in 1935, all employers -- union and non-union, large and small -- should take notice.

UNION ARGUMENTS FOR CHANGE

Union motives for banning permanent strikers replacements boil down to self interest, i.e., enhancement of the union strike weapon and union economic power. Unions argue that permanent replacements inhibit strikes and the effectiveness of strikes, and thus interfere fundamentally with the right to strike. Inescapably then, if permanent replacements are banned, there will be more strikes, enhancing labor's economic and ultimately its political clout. Unions attempt to translate this "logic" into "sound" public policy from which the public somehow will benefit.

UNIONS MISREAD LEGISLATIVE HISTORY

In the forefront of organized labor's effort to re-strike the historical economic balance in its favor, is labor's assault on the fundamental employer right to replace economic strikers permanently.

Union leaders argue, as did AFL-CIO President Lane Kirkland before a House subcommittee on March 6, 1991, that the right to replace strikers permanently is merely a "judicially created" right, not a right envisioned by Congress when it enacted the NLRA in 1935. In other words, the Supreme Court's recognition of an employer right to replace strikers permanently is only court "dicta," merely a judicial misunderstanding of the true will of Congress. Labor argues that Congress should correct this fifty-five-year old "misinterpretation" because, as unions see it, the permanent replacement of strikers fundamentally interferes with the free exercise of the right to strike.

Labor's view of history is truly revisionist. It is clear from the legislative history of the NLRA in 1935, that Congress was well aware of the employer right to operate during a strike and the right to hire temporary or permanent replacements, and had no intention of eliminating or curtailing those rights. Thus, Senator Wagner's bill, S. 1958, which later became the NLRA, departed from an earlier bill, S. 2926, by including economic strikers in the definition of "employee". A 1935 Senate report comparing S. 2926 and S. 1958 states:

> . . . S. 1958 provides that the labor dispute shall be "current," and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis.
>
> . . . .
>
> The broader definition of employee is S. 1958 does not lead to the conclusion that no strike may be lost or that all strikers must be restored to their jobs, or that an employer may not hire new workers, temporary or permanent, at will.

Thus, the Supreme Court in the Mackay case three years after passage of the NLRA, was not "creating" a new employer right to replace economic strikers permanently. It was confirming a right that Congress clearly recognized in 1935. Since then, the Court in numerous cases has reaffirmed that same employer right. For instance, citing Mackay in 1989, the Supreme Court observed in Trans World Airlines Inc. v. Independent Federation of Flight Attendants, 109 S.Ct. 1225, 1230:

> We held that it was not an unfair labor practice under § 8 of the NLRA for the employer to have replaced the striking employees with others "in an effort to carry on the business," or to have refused to discharge the replacements in order to make room for the strikers at the conclusion of the strike. Id., at 345-346, 58 S.Ct., at 910-11. As we there observed, "[t]he assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filed." Id. at 346, 59 S.Ct., at 911. On various occasions we have reaffirmed the holding of Mackay Radio. See NLRB v. Erie Resister Corp., 373, U.S. 221, 232, 88 S.Ct. 1139, 1147, 10 L.Ed.2d 308 (1963) ("We have no intention of questioning the continuing vitality of the Mackay rule,. . ."); NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379, 88 S.Ct. 543, 546, 19 L.Ed.2d 614 (1967) (Employers have "'legitimate and substantial business justifications' for refusing to reinstate employees who engaged in an economic strike . . . when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations"); Belknap, Inc. v. Hale, 463 U.S. 491, 504, n.8, 103 S.Ct. 3172, 3180, n.8, 77 L.Ed.2d 798 (1983) ("The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for its refusal to reinstate strikers").

If more proof were needed that Congress in 1935 recognized the right of struck employers to replace economic strikers permanently, one only need consider that major revisions to the NLRA were enacted in 1947, 1959, and again in 1974. No attempt was made by Congress to "correct" the view of Congressional intent expressed by the Supreme Court in Mackay. Certainly, Congress has had many opportunities to ban permanent replacements if it felt the Court had misinterpreted its intent in the Mackay case. Congress did nothing of the sort.

EXPERIENCE FAVORS NO CHANGE

Proponents of the ban on permanent striker replacements also argue that "fairness" requires this legislative change. They argue that employers did not hire permanent replacements with any significant frequency before the 1980s, before employers were emboldened by President Reagan's move against striking air traffic controllers in 1981.

The 1981 air traffic controllers' strike has nothing to do with the hiring of permanent striker replacements by private employers subject to the NLRA. Air traffic controllers are federal employees and are prohibited from striking by federal law. When the controller strike threatened to shut down the nation's airlines in 1981, and controllers ignored repeated back-to-work warnings, they were fired, not replaced, for violating federal law.

A recent study by the General Accounting Office (GAO), an arm of the Democratic-controlled Congress, is cited to support the proposition that permanent replacements were hired with greater frequency in the 1980s than in the 1970s. The GAO study, however, is fatally flawed. It contains no empirical evidence at all about the 1970s and, instead, concededly relies upon "opinion." GAO conclusions about the 1980s are projected from its study of incomplete data on strikes in only two years, 1985 and 1989. GAO obtained its data on strikes during those two years from the Federal Mediation and Conciliation Service (FMCS). Yet, GAO concedes it did not verify the FMCS data. Moreover, FMCS supplied only information on strikes of which it was aware; but, there is no requirement that strikes be reported to the FMCS. FMCS data also included information on strikes not subject to the NLRA at all, including airline and railroad strikes and strikes by public employees in primary and secondary schools. Thus, GAO's conclusion that permanent replacements were hired in 17 percent of the strikes in 1985 and 1989, is totally unreliable. The conclusion is based on incomplete and irrelevant information that is bound to exaggerate the frequency with which strikers were permanently replaced. Similarly, GAO's conclusion that four percent of the strikers in 1985 and 1989 were permanently replaced is grossly inflated with airline and government strikers who are not subject to the NLRA. GAO also fails to note how many "replaced"

strikers were preferentially reinstated when strikes ended. In short, the GAO "study" adds no reliable support for a new ban on permanent striker replacement.

ALL EMPLOYERS SHOULD BE CONCERNED

The fact is, there are no compelling arguments for banning permanent replacements and upsetting careful economic balances that have served the country well for over fifty-five years. Employers permanently replace their striking employees only as a last resort and do not take such a drastic step lightly.

Employers make huge investments in their workforces. Training is costly. Worker skills and experience develop slowly. Employers do not look forward to the strike as a convenient opportunity to hire a new, untrained workforce. Employers seek to avoid strikes whenever possible for the obvious reasons that strikes are seriously disruptive and impair valuable business and customer relationships, often irreparably.

Strikers are permanently replaced only as a last resort. An employer, faced with stiff domestic and foreign competition and the prospect of a strike, must decide whether to attempt to operate during a strike and if so how. Continued operations frequently are vital to the continued health of a business. In service industries, for instance, it is not possible to stockpile inventory. Customers and suppliers once lost may be lost forever. Usually, it is not feasible to operate for long periods with supervisors.

Temporary striker replacements are not an answer for the struck employer either. Temporary workers willing to work for uncertain periods during a strike are either non-existent or in short supply. Strike related violence and intimidation, on and off the picket line, most frequently directed at replacement workers, are often major causes for the shortage of striker replacements. Striker replacements are frequently branded "scabs" and threatened, assaulted, insulted, spat upon and followed to their homes. They often receive threatening phone calls. Their cars and homes may be damaged and shots fired through their windows. Striker violence all too often receives implicit union condonation, and sometimes even encouragement. Temporary replacements willing to endure these risks and indignities are difficult to find.

Neither is it a solution, as some have suggested, for permanent replacements to be permitted only if temporary replacements cannot be found. Under this scheme, it would be the struck employer's burden to prove the unavailability of temporary replacements. This burden would foreclose the hiring of permanent replacements as a practical matter. Difficult burdens of proof placed upon struck employers, and the attendant back-pay liabilities if those burdens cannot later be met, would discourage employers from offering permanent employment to striker replacements. Just the practical delays involved in testing the availability of temporary replacements would present insurmountable hurdles for struck employers. To relegate struck employers to hiring temporary replacements is to deprive them of their historical right to hire any replacements at all.

Unions argue that strike violence is caused by the hiring of permanent striker replacements. This argument is a red herring. The objective of striker violence and misconduct is to prevent a struck employer from operating its business during a strike. Violence and threats of violence are directed at anyone who contributes to the employer's effort to operate. These can be supervisors, non-strikers, temporary or permanent replacements, subcontractors, and even suppliers and customers who attempt to enter a struck premises to make deliveries or pick up products. When there is violence and misconduct, on or off the picket line, usually it begins long before permanent replacements are hired. Violence and intimidation are intended as a deterrent to anyone who would assist a struck employer and, therefore, it is grossly misleading to assert that permanent replacements are the "cause" of striker misconduct.

A MATTER OF GENERAL CONCERN

The general public, as well as all employers, should be alarmed by the proposed legislative ban on permanent striker replacements. As indicated, it is a virtual certainty that a ban would promote strikes and exaggerate union economic and political power. More costly contract settlements imposed upon employers mean higher prices for the public or lost goods, services and jobs. A recent independent poll conducted for the Employment Policy Foundation shows that 63 percent of the public

believes employers should have the right to operate during a strike, while only 25 percent believes employers should not have a right to operate with permanent strike replacements. In addition, 54 percent of the public believes that permanent replacements should not be fired at the end of a strike, while only 34 percent believes that permanent strike replacements should be fired to make way for returning strikers.

The unionized employer who does not anticipate strikes or foresee the need to replace strikers permanently must remember that favorable business economics can change rapidly. So can a healthy labor-management climate. Foreign competition, economic downturns, expiring patents, environmental restrictions, and government regulation and deregulation, can rapidly change business economics. Harmonious labor-management relationships can sour with changes in union leadership. Employers with multiple facilities can enjoy harmonious labor-management relationships at some locations and unconstructive relationships at others. The right to replace strikers permanently is an important reserved right for all employers, including those who may some day have to choose between anti-competitive union bargaining demands and the economic viability of their businesses.

Even large employers, with no need to replace strikers, may have suppliers and customers for whom strikes and the need to replace strikers permanently are more immediate concerns. To sit by and do nothing while Congress abolishes the right to hire permanent striker replacements invites serious negative consequences for all employers, if not directly then indirectly. Even non-union employers must be concerned. Guaranteed reinstatement for strikers, like returning veterans, would make effective organizing propaganda for unions that are looking for creative ways to reverse their flagging organizing fortunes.

Moreover, despite denials from some proponents of a legislated replacement ban, H.R. 5 and S. 55 are worded broadly enough to apply to non-union as well as unionized employers. For instance, the bills clearly would apply to non-union employers faced with strikes by their employees to compel recognition of a union. In addition, the bills' preferences and protections could be construed to apply not only to unionized strikers but to non-union employees who engage in work stoppages or "other concerted activities." The bills' preferences for strikers extend ambiguously for the duration of a "labor dispute," not just the duration of a strike.

H.R. 5 and S. 55 actually encourage strikes by granting job and promotion preferences to strikers and by insulating them from the negative effects of their strike. Strikers are given preferences over non-strikers. Strikers who hold out until the end of a strike are preferred over "crossovers" who exercise their statutory right to abandon a strike and return to their jobs. More senior strikers, whose strike has damaged their employer's business and caused a contraction of the workforce, would be entitled to displace junior non-strikers and crossovers for remaining positions. Promotions and job assignments granted during a lengthy strike would be undone.

SOWING LABOR-MANAGEMENT DISCORD

The late 1970s saw serious legislative battles that polarized labor and management. The fight over "common situs" picketing that would have authorized construction unions to shut down entire construction sites over disputes with a single site contractor ended with a presidential veto. Bitter disputes over NLRB appointments brought partisanship and filibusters. Labor Law Reform in 1978 was an overt attempt by organized labor to enhance its organizing efforts by changing basic ground rules to the advantage of unions. The effort aroused staunch management opposition, and the proposal's ultimate defeat in the Senate polarized relationships between labor and management for many years.

The 1980s brought a measure of labor-management reconciliation. In part prompted by the realities of foreign competition and recession, labor and management learned to preserve businesses and jobs through cooperation. Unions agreed to concessions, unimagined in the 1970s, that kept plants open and saved jobs. In some instances, unions made constructive contributions to management decision-making. Many employers reciprocated by keeping plants open and by providing enhanced job security and work quality programs for employees. Strikes are at near record low levels according to a recent study by the Bureau of Labor Statistics.

Now, H.R. 5 threatens to polarize labor and management once again. Management sees this legislative effort as yet another attempt by organized labor to move the goal posts. Employers also fear that H.R. 5 is only the beginning of a parade of labor law "reforms." Indeed, just as the legislative session ended in 1990, civil monetary

penalties for unfair labor practices were inserted without warning into a budget reconciliation bill that passed the House of Representatives.

It is regrettable that organized labor has decided to provoke new labor-management distrust by embarking upon this legislative program to ban striker replacements. By changing the rules to reduce risks of job loss for strikers, labor appears to be signaling that it is tiring of cooperation and eager to increase the frequency of strikes. This is a signal that could not come at a worse time for employers already under siege from the effects of recession, tight credit, and foreign competition.

CONSTRUCTIVE LEGISLATION

If Congress wants to make a constructive contribution to collective bargaining, it should consider strong measures that would reduce strike-related violence and intimidation. As indicated, violence and intimidation directed at non-strikers, temporary and permanent replacements, members of management, and customers and suppliers has become a way of life on and off the picket line. Serious misconduct, most often engaged in by strikers, is one reason why it is totally unrealistic to suggest that struck employers can successfully operate their businesses with temporary striker replacements.

In connection with labor disputes, a hotel was set ablaze with serious loss of life in Puerto Rico. Miners hidden in the hills of Virginia and West Virginia fired shots, not only at striker replacements but at coal haulers and customers as well. A pitched battle was fought by unionists in International Falls, Minnesota. Buses filled with passengers were fired upon in the Greyhound strike. Beatings and burnings have been commonplace in the Daily News strike. According to the March 2, 1991 New York Times, there were 3,000 assaults, explosions, broken windows and burned vehicles in Virginia alone during the recent ten-month Pittston-UMWA strike. According to the Times article, arson and other violence has been directed at stores and newsstands selling the Daily News, and thirteen tractor trailers of another company that haul rolls of news print were set afire in Brooklyn. These victims of strike violence were not permanent replacements. And besides, no one knows whether replacements in the Daily News strike, or for that matter

the Greyhound strike, are permanent replacements at all, as this issue is pending before the National Labor Relations Board.

There is no valid excuse for this recurrent violence. Strong measures are needed to protect non-strikers and the public from open warfare initiated by strikers and their sympathizers. If these acts of terrorism had been directed at strikers by employers, it is safe to say that strong measures would have been enacted by Congress long ago. The first order of business for Congress should not be to encourage strikes by banning permanent replacements. It should be to enact stiff penalties for strike-related violence and to consider more central and effective roles for the NLRB and the Department of Justice in combating strike violence.

CONCLUSION

In sum, the proposed ban on permanent striker replacements is not, as organized labor contends, a mere correction of "judicially-created" law to reflect the true will of Congress. On the contrary, the proposed change strikes at the heart of the delicate economic balance between labor and management clearly struck by Congress in 1935. Neither is it a change needed to "restore fairness." Instead, it is a change designed to tie management's hands in collective bargaining. It is a change that would interfere fundamentally with management's right to operate during a strike. And, clearly, it is a change that would encourage strikes.

There are important principles at stake for all employers in this new "labor law reform" initiative. An examination of this top priority on labor's legislative agenda should prompt responsive employer concern and action. Labor and its numerous advocates in Congress should not be allowed to succeed with clever efforts to divide the management community on this important issue. Surely unions would parlay a victory on the striker replacement ban into new "labor law reform" initiatives that would further undermine management efforts to improve competitiveness.

LEGAL ADVISORY COUNCIL

The NLCPI Legal Advisory Council has performed exceptional service in guiding the Center's legal programs. The Council, comprised of lawyers and academicians, has been of particular value to the organization in giving counsel and in identifying key issues and authors for the Judicial Series of monographs and other writings. The Center is indebted to members of the Council for giving so generously of their time. Members of the Council are:

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ACADEMIC ADVISORY COUNCIL

The National Legal Center has instituted a new advisory board, the Academic Advisory Council. The Council will be analogous to the Center's Legal Advisory Council and will assist the Center in identifying important legal and constitutional issues and shaping the various programs and publications. The Center is grateful for the scholars who are willing to give of their time and expertise. The members of the Council are:

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April 16, 1993

The Honorable Howard M. Metzenbaum
United States Senate
Russell Building, Room 140
Washington, D.C. 20510

Dear Senator Metzenbaum:

I am writing to correct some testimony concerning S.55 which was delivered to the Senate Committee on Labor and Human Resources on March 30, 1993 by Jerry J. Jasinowski, President of the National Association of Manufacturers.

I am referring specifically to Mr. Jasinowski's reference to the stance of the Collective Bargaining Forum concerning striker replacement hiring. Mr. Jasinowski is a member of the Forum as am I.

Mr. Jasinowski testified (page 4 of his testimony) as follows:

"One issue, however, on which consensus has been elusive is striker replacement, we have agreed to disagree — on numerous occasions — within the Forum just as NAM disagrees with proponents of S.55 and H.R. 5."

Contrary to his statement, the Forum has taken a position in opposition to striker replacement hiring. I would refer you to a statement adopted by the Forum and published by the Department of Labor in 1991 titled "*Labor-Management Commitment: A Compact for Change.*"

On page 12 of that statement (a copy of which I have enclosed) is a paragraph headlined "*Conflict Resolution.*" It reads, **"The Forum recognizes that even a highly cooperative relationship contains elements of conflict with which the parties need to deal. Maximum resolution of conflicting goals should be encouraged without destroying or jeopardizing the common bonds between the parties. It is in the interest of both parties to resolve differences fairly and amicably, without resort to strikes, lockouts, and replacement hiring..."** (Emphasis supplied).

After reading this, I believe you will agree with me that Mr. Jasinowski's testimony to the committee was very misleading to say the least. Sadly, his testimony seems to be representative of almost all of the information being published by opponents of this proposed legislation, that is, there is seldom any truth to most of what they say and publish.

The members of my union and I greatly appreciate the work you are doing on this legislation. Please let me know if there is anything we can do to help.

With best regards, I am

Sincerely,

Wayne E. Glenn
PRESIDENT

Views from the Collective Bargaining Forum

Labor–Management Commitment: A Compact for Change

U.S. Department of Labor
Bureau of Labor-Management Relations
and Cooperative Programs

BLMR 141

1991

Conflict Resolution

The Forum recognizes that even a highly cooperative relationship contains elements of conflict with which the parties need to deal. Maximum resolution of conflicting goals should be encouraged without destroying or jeopardizing the common bonds between the parties. It is in the interest of both parties to resolve differences fairly and amicably, without resort to strikes, lockouts, and replacement hiring. Coercion, distortion, fear campaigns, inflammatory conduct, corporate campaigns, protracted strikes, the use of violence by either party, and quasi-legal strategies to combat unionism or harass management are destructive by their nature. Tactics and strategies employed by either party should be consistent with an ongoing cooperative relationship if conflicts are to be effectively resolved.

STRIKING AND PRAYING AT DIAMOND

Terms of employment

by Theodore H. Erickson

TUESDAY 10 A.M. The October sky is gray over Stockton, California. Diamond Way is lined with men and women carrying placards. Huge trucks roar through chain-link gates—walnuts coming in from orchards to be processed, products going out to be sold around the world.

A trailer sits at the far end of the road next to the Southern Pacific Railroad tracks. "On Strike," say the signs. "International Brotherhood of Teamsters. Cannery Workers Local 601." Inside the fence workers scurry back and forth—scabs, or more politely, "permanent replacement workers." Outside the gate pickets walk more slowly, stopping to talk. They have been walking for over a year. They are resigned to walking.

Diamond Walnut Growers, Inc., was organized as a cooperative in 1912 and today has more than 2,000 California walnut growers as members. Diamond's processing plant, built in Stockton in 1956, employs about 300 people year-round and up to 450 seasonal workers. One of the strikers is Toni Escobedo, a fork-lift driver who had 19 years of seniority before the strike action. "We made this plant," she says. "We were 'Team Diamond.' Good pay. Pride in our work. Then in '85 it began to change." That year the company claimed that it was almost bankrupt. Workers were asked to take cuts in pay up to 43 percent. They took the cuts in good faith, and even came up with some cost-reduction ideas. Local 601 had represented the workers for over 40 trouble-free years. "Team Diamond," they thought, would never let them down.

But between 1985 and 1991, as Diamond returned to high profitability and payments to growers increased by 65 percent, wage increases lagged behind inflation. The growers took care of themselves while the workers saw their real wages decline.

There were other changes. A wall went up in the cafeteria, separating management and office workers from plant workers and sparking animosity between workers and management. Old friendships were ruptured. Bosses began to enforce arbitrary rules for restroom breaks. Sick leaves were canceled. "They treated us like dogs," says Gladys White, who was fired when she was hospitalized for lung disease. That meant no health insurance. Today she walks the picket line.

By 1991 Diamond Walnut was very profitable. It was time for the company to restore workers' salaries to previous levels. Instead, Diamond offered a 10 cent per hour pay raise and a cut in workers' health insurance payments. It also proposed an "incentive program" designed to drive a deeper wedge between labor and management by establishing a wage differential between year-round and seasonal employees.

Negotiations were unsuccessful through June 30, 1991, the end of the contract period. In August of that year the company brought in replacements to be trained by regular workers. By

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September, the beginning of the harvest season, scabs were in place. The union began the strike on September 4.

Eleven A.M. As if summoned by an inaudible bell, the picketing men and women put down their signs and begin to head toward a spot under the spiraled barbed wire atop the fence. They gather in concentric circles. There are 40 or so, mirroring the diverse population of California's central valley: Latino, Anglo, African-American, Asian-American, young and old. They wait expectantly. Then an African-American man steps forward. He asks the people to take hold of the hands next to them and bow their heads. He prays quietly, asking God's blessing. A Latino woman begins to speak. Her tone is determined and positive. The strike, she says, has created a new community. It has forced them all to understand what is important in life. It had awakened them from a false trust in the company and taught them to put their trust in God. Now, she said, we help one another, in the faith that all things needful will be given to us.

> **Do the workers have the power to bargain collectively, or is the company able to dictate all terms of employment?**

Another woman steps forward holding a well-worn Bible. She reads from 2 Corinthians 7 ("I am filled with comfort. With all our affliction, I am overjoyed") and Isaiah 54 ("Fear not, for you will not be ashamed; be not confounded, for you will not be put to shame"). Many of those in the circle know the key passages and repeat them aloud with her. Several give their own testimonies.

A third woman spontaneously reaches for the Bible and reads Psalm 91 ("Because you have made the Lord your refuge, the Most High your habitation, no evil shall befall you, no scourge come near your tent"). She testifies how this passage has helped her through all kinds of trouble.

Then the preacher begins. He starts slowly, picking up on the theme of the strike's blessings. As he warms to the message, his voice takes on the cadence of Pentecostal preaching: "When you put your faith in Diamond you put faith in man. But now we know that Diamond is the enemy. All we got left is God. Only God will bring us through this time of trial." Now he is moving around the circle, striding, bending and weaving. All are moving with him in the Spirit. They are, for a moment, a new community.

Then he prays. He prays for the adversaries inside the fence—the managers and the scabs. "May God be with them, and show them the light." There is singing—a solo, a duet, a hymn. We hold hands again for the benediction. The circle breaks up, signs are retrieved, the walking resumes. Another week in the life of Local 601.

In one sense, Diamond Walnut is but another example in a dreary procession of union-busting companies that precipitate a strike, hire permanent replacements, and then move toward decertifying the union by letting the scabs vote to end its representation. The fact that labor relations at Diamond had been harmonious for decades prior to 1991 testifies to the company's sudden shift in strategy vis-à-vis collective bargaining—a shift traceable to Ronald Reagan's 1981 firing of air traffic controllers. Diamond's rationale—a common plea in corporate America—is that it must improve its position in an increasing competitive international marketplace. In other words, the cost of labor is too high in the U.S., and therefore American workers must learn not only to accept a level of income typical of that of workers in the Third World but also abandon collective bargaining and return to the "yellow dog" contracts of an earlier era.

Institutional religion and organized labor rarely have much to do with one another. Religion is supposed to be altruistic; labor is supposed to be self-interested. "Big labor" is often regarded as beyond the pale of concern by religious bodies, and religion is usually of little consequence to labor except as an occasional ally during a particularly tough strike. For most people, labor-management disputes are simply the result of conflicting economic interests, not of moral or ethical issues.

But the moral implications of the Diamond strike run deep. First, there is the legal question. The National Labor Relations Act, passed by Congress in 1935, declared that it is U.S. policy to encourage the practice of collective bargaining. Over the past decade, however, corporate practice has focused on undermining that policy by exploiting legal loopholes, appealing unfavorable decisions, and otherwise delaying justice until, all too often, it is denied. Diamond's current management team, the fourth in the past seven years, is simply relying on well-established methods of union-busting. The primary victims, however, are not labor organizations but individual workers.

The second ethical issue becomes clear in the following dialogue between Representative Tom Lantos (D., Calif.) and William Cuff, CEO of Diamond Walnut, at a hearing held by the House employment and housing subcommittee in San Francisco last September:

Lantos: "My understanding is that the striking workers were permanently replaced during the first week of the strike; is that not true?"

Cuff: "In a practical sense as I understand it, that subject did not come up until a negotiating session that Mr. Hulteng [attorney for Diamond Walnut] appeared at in November [of 1991] where the issue of return to work came up. Mr. Hulteng, in fact, at that time gave me a call . . . and said, 'Bill, what do you want to do about this?' and I said, 'I do not plan to fire the replacement workers.'"

Lantos: "You had more . . . loyalty to the people who had worked for you for a few weeks than to the workers who had worked for the company for decades, is that right?"

Cuff: "These replacement workers, Mr. Lantos, worked extremely hard. They—"

Lantos: "I do not question that. I asked a very simple question. I am going to repeat that question and I

would appreciate it. Mr. Cuff, if you would answer the question I asked. You had two groups of people here. One group of people—we have had three of them testify here—have worked for you for years, in most cases for decades. There were other workers who worked for you for a few weeks. You had clearly more loyalty to the strikebreakers who worked for you for a few weeks than to the people who built this company and made it profitable for a period of years and decades, is that true?"

Cuff: "As I have said, I made the decision not to fire the replacement workers. They went through a great deal of difficulty, hard work, hard training. They crossed picket lines. They were threatened. There was violence involved. There were homes that were attacked. And I could not turn my back on them, and I decided I would not."

Lantos: "But you could turn your back on people who worked there for—how old are you, Mr. Cuff?"

Cuff: "Fifty."

Lantos: "Fifty. [People] worked there, according to testimony, when you were in high school. Our first . . . witness's husband—Mrs. Zavela's husband—worked for 33 years for this company. You were a high school junior when her husband started working for this company. He worked there for 33 years, probably taking home not much more than a very modest . . . paycheck. . . . And you apparently feel no compunction whatsoever about dumping these people out onto the street, depriving them of their health insurance, and, given the large rate of unemployment in the Stockton area, depriving them of an alternative means of making a living. But you have tremendous empathy for people who had no contact with this company until two weeks earlier . . . Was it necessary to hire 'permanent,' as opposed to temporary, replacements? Were there not hundreds of temporary workers available in the Stockton area?"

The Diamond CEO argued that since the replacement workers had left other jobs seeking a career change, the company could not in good conscience fire them. But, asked Lantos, if that was the case why were all replacement workers forced to sign a document stating that they could be terminated without notice or cause?

"The basic question in this dispute is one not of wages, hours or benefits but of power. Do the workers have the power to bargain collectively with the company, or is the company able to dictate all terms of employment? Unfortunately, this is a question that many people, including many members of religious bodies, are not prepared to answer. Capitalism has a long tradition of identifying authority with ownership and, by extension, with management. What is forgotten is that the corporation is a public institution, organized to serve the public, eligible for public support, and finally accountable not only to stockholders but also to the public, to the people as a whole.

There is within market capitalism a recurring ideology that regards labor only as a commodity to be purchased at the lowest possible market rate. But as Lantos put it, "We are really discussing how our capitalistic system functions—whether it is a humane system willing to engage in a dialogue and give and take, or rather is determined to drive an advantage to the bitter end, irrespective of the human cost." Moreover, the same people who constitute our nation's workforce also constitute the bulk of society. They are not only taxpayers but also full-fledged members of the public to which both political authority and corporate management are finally accountable.

Labor unions are often depicted as the enemy of free market capitalism, sources of inefficiency and even corruption. A growing number of corporations are taking advantage of this widespread attitude as they mount an assault on collective bargaining. As a result, the American people are not fully aware of the dangers inherent in this assault, the flouting of federal law, the abuse of human dignity, the fragmentation of communities, the destruction of families, the growth of poverty and inequality, the concentration of wealth in fewer hands, the decimation of the middle class. It is an assault on the fundamental character of our democratic political order in the name of global economic competitiveness.

Political democracy has religious roots. The insight that under the sovereignty of God no human ruler should claim divine right led to the further insight that the power of political decision-making properly resides with the people as a whole. The principle of collective bargaining is derived from the same insights. Collective bargaining is an orderly and effective way for workers to obtain parity of power with their employers. It is the institutionalization of economic democracy. However, in a secular age, when both religious faith and daily work are relegated to the private sphere, it is difficult to understand the religious roots of economic democracy.

But every Tuesday at 11:00 A.M., striking members of Cannery Workers' Local 601 proclaim publicly their God-given power. They celebrate their faith. They pray for their tormentors. They resist the temptation of greed that seems to have consumed their employer. They seek only that which has been stripped away from them: dignity, community, respect, the ability to feed and educate their children, a small share of the world they have helped build. And day after day they walk with their placards, asking the ancient question: "How long, O Lord, how long?" ■

STATEMENT OF JULIUS GETMAN

For the past three years I have been conducting a field study of the Mackay doctrine. I have studied its impact on replaced employees, their families, and communities; as well as its signficance for the union, and the company. My study has focused especially on the strike at the Androscoggin Mill in Jay, Maine, from 1987 to 1988 - an event that other scholars have referred to as the pivotal strike of the 1980s. This strike, together with the preceding and subsequent events, powerfully illustrates the unfairness of the Mackay doctrine and the specious nature of the arguments made in its support.

The Mackay doctrine had a harmful impact on negotiations prior to the strike. The availability of the doctrine made the employer less willing to compromise, and fear of its use made the union and its members suspicious of management's motives.

Once the strike began the hiring of permanent replacements by the company doomed the post strike negotiations. It added a bitter overriding complex issue that increased the anger of both parties.

The result of the strike was an economic catastrophe for the employees and their families. Many have not yet found adequate employment. Many of the former employees lost their life savings. The children of strikers were deprived of the opportunity to attend college, marriages were dissolved, and friendships terminated. A community that had lived peacefully and harmoniously, proud of its relationship to the craft of paper making,[1] was fragmented. Many of the resulting divisions became so strong as to be virtually unmendable. Not only strikers, but also several floor level managers who had deep roots in the community, felt betrayed by the company.

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[1]The signs on the local highway announced "Welcome to Jay - A Paper Making Town." These signs were removed during the strike.

In the aftermath of the strike the plant, once a productive community, became factionalized and production fell. Indeed, the consequences of the strike were sufficiently grievous that several other paper companies decided that "there had to be a better way," and management moved towards greater cooperation with the union.

However, the improvement at other companies provided little comfort to those who lost their jobs and saw their families and communities severely harmed. And while there are signs that both International Paper and the UPIU are seeking to avoid a similar confrontation in the future, it is the employees at Jay, not the officials of International Paper or the International Union, who lost their jobs and whose lives have been irretrievably altered.

In the testimony and material presented to the committee in support of the Mackay doctrine, the argument was repeatedly made that the harmful effects of the Mackay doctrine are significantly reduced because permanently replaced strikers have recall rights under the Board's Laidlaw doctrine. This argument is made by academics who have not studied the actual impact of Mackay or by company officials or lawyers whose own jobs do not involve day to day living with the consequences of Mackay.

In many ways the effect of the Laidlaw doctrine is to perpetuate the divisions caused by the hiring of permanent replacements. At the Androscoggin Mill, the first replaced strikers who returned to employment felt isolated, angry at management, furious at the replacement workers, and even more angry at those of the former strikers who crossed the picket line. They felt (and still feel) disloyal to their fellow workers not yet recalled, whenever they had to deal with the replacement workers. As a former striker told me,

> I go in everyday with the same thought, just because I've got my job doesn't mean it's over. I've still got 600-800 friends on the outside and until they're back, I refuse to socialize with these people.

Another former striker commented, ". . . I worked this job for almost seven years and basically I've gone back to a janitor."

The situation was further exacerbated for those who faced the indignity of working as subordinates to the replacements and crossovers. Many of the former strikers were unwilling to give the company their best efforts. During the summer of 1990 one of the former strikers told me,

...I absolutely refuse to give any intelligence.

> There's all kinds of tricks of the trade that you learn and when I'm working with a scab I will not use anything I ever learned. We do it the old way, brute strength and ignorance. I pull my ass eight hours knowing full well in five minutes I could get it done another way.

Two years later the same employee, basically a friendly and cooperative person, told me that he was still, as he put it, "consumed with hate." His anger lingered in spite of repeated efforts and long discussions with his parish priest.

Several of the employees at Jay had family members who were in management. In most cases, relations were cordial and loving before the strike, but during the strike low level management escorted the replacements and parked vehicles across the picket line, and the results were inevitable. In many cases anger and resentment superceded love and affection. As one of the former strikers said to me:

> A problem I have is that I have a brother-in-law that's in management, married my sister Annette. That for me was the hardest thing to deal with because we have a common point, that's my mother and my dad.
> We're not enemies but it's hard for me to deal with him. I try not to cause problems so I try to keep the contact to a minimum because I am strongly opinionated of my side and he works for the company, I don't know how he felt about it in his heart but I mean, of course, he continued to work in the plant.

A former supervisor, not a union supporter, who quit his job after the strike, explained his decision to me in an interview as follows:

> I was one of the older people there. But after a while I felt that I was the stranger, and the replacement workers, they were the ones running the place. With the old crews, they knew you. You went fishing with them, you went bowling or hunting or

something like that. It was a community sort of thing. They'd see you on the streets and you knew everybody. The new workers came in and you knew nothing about them, they could have been convicts or anything but you knew nothing about them.

Nobody even gave it a thought. They were just going to replace the people if they didn't go along with the contract and they didn't worry about how the salaried people felt about the whole thing. We had nothing to say of what was going on, it was just like you know, you are there, you're gonna get paid and you do your job and that's it.

No one who talks to the replaced strikers, or listens to their families, or visits their communities could, in good conscience, support the continuation of the Mackay doctrine.

Senator METZENBAUM. The committee stands adjourned.
[Whereupon, at 12:40 p.m., the subcommittee was adjourned.]

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